THE EFFECT OF WAR UPON TREATIES

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PREFACE

The task of determining the effect war has upon treaties entered into before the war is very difficult due to the lack of a uniform practice on the part of states in their Peace Treaty arrangements. Publicists, Jurists and International bodies are more nearly uniform in their views and opinions upon what effect war should have upon treaties. But up to the present time no rules have been laid down by International legislation for the guidance of belligerents in their Peace Treaties to determine the legal status of treaties made before the war.

This study seeks to do two things: to summarize the opinions and views of writers, Courts and International associations regarding the effect war should have upon treaties, and to note their application by states in their Peace Treaties. By this method certain definite conclusions have been reached as to the status of the different groups of treaties entered into before hostilities broke out.

Views upon the effect that war should have upon treaties have changed greatly in the past few centuries. Many things have entered to bring about changes both of views on the subject and in the practice of states. With a gradual evolution of social order, war and its effects have kept pace to some extent.

This study was begun in 1917 at the suggestion of Professor J. W. Garner of the Department of Political Science, and has been carried on under his direction. I wish to express my appreciation of the assistance rendered and the inspiration given by him throughout the period of study. The helpful criticism given by the other members of the Department of Political Science

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Part I.

THE EFFECT OF WAR UPON TREATIES IN GENERAL

Chapter I.

INTRODUCTION

The effect of a declaration of war upon treaty arrangements between the belligerent powers is, up to the present time, one of the unsettled problems of international law. That the beginning of hostilities between two states should seriously interrupt the ordinary relations between them is inevitable. The early conception "that war annulled all laws, treaties, and arrangements previously existing between the belligerent states, and that man reverted to a previous state of nature in which no recognized rights, except the right of force, existed" has largely disappeared.

The idea that war must be as terrible as possible still has some adherents, but the practice of the majority of powers tends in the opposite direction. War is no longer looked upon as involving in absolute hostility all the citizens of the belligerents, even as to the most peaceable pursuits; it is no longer the complete negation of lawfulness, the unchaining of all the barbarous impulses of which mankind is capable. Instead of destroying all law, war is itself subject to legal restraint, and as far as it affects individuals, it merely modifies the execution of jural remedies, but does not abrogate legal rights and principles.[1]

International law-breakers are, in the long run, arraigned at the bar of humanity, and history records their sentence. It is said that when von Ranke was asked by Thiers, during the Franco-Prussian War, "On whom, then, do you make war?" calling to mind the horrors and ravages of the Pa-

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1. Reinsch, Public International Unions, p. 169.

latinate, he replied, "On Louis the Fourteenth."[1] Article 3 of the Fourth Convention of the second Hague Conference undertakes to fix a responsibility for the violation of the rules laid down by the Convention. It declares that the belligerent party who violates the provisions of the treaty shall be held to make an indemnity, if there is a place for it, and that "he shall be held responsible for all acts committed by persons constituting part of his armed forces."

Originally the enemy was conceded nothing. "All that is taken from the enemy becomes ours," declared the Roman jurist, Gaius. The enemy himself, his wife and children, all human beings captured alive, all houses, lands, and movables formed, in Roman law, the prey of the captors. Movables belonged to the captor; immovables went to the state.[2]

The French Revolution was the turning point from this view, and newer ideas began to be formulated and exercised. Grotius had regarded pillage and the taking of all private property of the enemy as legal, and this view had been only slightly modified up to the time of Rousseau, who formulated a new idea of warfare and its effects.[3] His contention, which found ready acceptance among writers of international law, is that "war is a relation of state to state, and not of individual to individual; the individuals are enemies only by accident, and not as men, and not even as citizens, but as soldiers."

Rousseau's view was a complete reversal of the previous doctrine so well established, that war against a state necessarily implies war against every

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1. Higgins, The Hague Peace Conference, Introduction.
2. Sherman, Roman Law in the Modern World, Sec. 634.
3. Rousseau, Social Contract, Bk. I., Ch. 4.

individual subject of such state, and consequently the right to destroy him and his property. Rousseau's view was adopted by several powers, and it is found expressed in some treaties of the first half of the nineteenth century, as well as championed by several writers of that period.[1] It was not till after these views had been accepted by the different states that treaties relating to private rights were respected by belligerent powers.

"War", says Westlake,[2] "is a state or condition of governments contending by force." At the present time no substitute has been found that will take the place of war. For the redress of wrongs or the prosecution of claims states will appeal to the force of arms. International law found war already in existence and regulates it with a view to its greater humanity. "War is a piece of savage nature partially reclaimed, and fitted out for the purpose of such reclamation with legal effects, such as the abrogation, or suspension, of treaties and legal restrictions, such as what are called the laws of war and neutrality."[3] Its effect upon treaties previously entered into by the belligerent powers is a moot question; but some headway has been made towards an understanding in this most difficult field, and the various phases of the problem will be examined in the following chapters.

The lack of a uniform rule of international law governing the action of nations in their consideration of the effect of war upon treaties has resulted in the most extreme measures being employed. The action of Russia, in 1807, when the Czar declared that all treaties existing between Russia and England were abrogated, and that of France, in 1914, when she declared all treaties between France and Germany annulled and at an end, was inspired, no doubt, by national hatred, and the real purpose of treaty engagements was lost sight of.

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1. Huberich, Trading With the Enemy, p. 4.
2. International Law, Vol. 2, p. 3.
3. Ibid.

"Treaties", says Chancellor Lane, "are solemn engagements entered into between independent nations for the common advancement of their interests, and the interests of civilization." Speaking further of the object of treaties, he says: "and as their chief object is not only to promote a friendly feeling between the people of the contracting parties, but to avoid war and secure a perpetual peace, it is the moral duty of the contracting parties to maintain them inviolate- not only in time of peace, but in time of war, in so far as it can be done without the sacrifice of individual rights or the principles which lie at the foundation of personal and national liberty."[1]

From time immemorial sovereign states have entered into these self-limiting engagements, whose sanctity is vouchsafed by the national honor of the contracting parties. Vattel says: "He who violates his treaties violates at the same time the law of nations; for he disregards the faith of treaties, and so far as it depends on him, he renders it vain and ineffectual. Doubly guilty he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind."[2]

The society of nations has found, in fact, that, having no international legislature to resort to, treaties supply the means of directing and controlling the conduct of its members by express rules; hence, as with closer intercourse between nations the need of such direction and control has made itself felt, treaties have been increasingly used as a mode of international legislation. This tendency to have recourse to law-making treaties has been evident since the first of the nineteenth century. The first law-making treaty of world-wide importance was the final act of the Vienna Congress, 1815, in

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1. *In Posset, V. D'Espard.*, 100 Atl. 893 (1917), Law Notes, October, 1917.
2. *Droit des Gens*, Bk. 11, Ch. 15, p. 222.

which the slave trade was declared suppressed, the great European rivers were declared open to international commerce, etc.[1]

But it was not till the close of the last century, when the first Hague Peace Conference met, that the force of international opinion was clearly manifested. No legislative program so extensive had ever before been attempted. The second Hague Conference was still more world-embracing. All the larger powers were represented and the new era for international law seemed imminent. On recommendation in its final act that a third international peace conference at the Hague be summoned, there seems a likelihood of the Hague Conference becoming a permanent international institution. Law-making treaties are mostly unlimited in respect to duration, but the right of a party to withdraw from them by denunciation is very frequently reserved. They are not, like many classes of treaties, terminated by the outbreak of hostilities between the contracting parties.

The fate of treaties existing between belligerent powers will remain, for the most part, undetermined until the peace agreement at the close of hostilities. It is quite likely that each belligerent will attempt to follow that course which is the most advantageous to it- a practice well illustrated by a remark of Bismarck in his reflections: "No treaty can guarantee the degree of zeal and the amount of force that will be devoted to the discharge of obligations when the private interests of those who lie under them no longer reinforce the text and its earliest interpretation."[2]

On the other hand, certain well known customary rules have been established which belligerent powers consider as determining the status of their

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[1] Whittuck, International Documents, Introduction.
[2] Phillips, W. A., The Confederation of Europe, pp. 4-6.

treaties with enemy states. Treaties of amity, commerce, etc. are usually considered abrogated by the outbreak of hostilities.[1] Treaties of a permanent character, but whose operations are impossible because of the condition brought about by the war, are considered suspended only, and will revive at the conclusion of peace.[2] Treaties entered into in contemplation of war and for the purpose of regulating belligerent operations are brought into force upon the outbreak of hostilities.[3] Treaties of a permanent character and executed once for all are unaffected by the outbreak of hostilities between the contracting parties,[4] while the great international law-making treaties, the international unions, conventions etc. are either brought in force, suspended, or unaffected by the outbreak of war between two or more parties to the engagement. Circumstances and the peace treaty will determine to some extent the status of such relations.[5]

Efforts have been made from time to time to formulate and put into practice rules to guide belligerents in determining what effect war will have upon their different treaties. Authors have outlined elaborate plans to be followed by belligerents.[6] The Institute of International Law, composed of representatives from all the leading states, adopted an elaborate project at its session in Christiania, August, 1912.[7] Many other plans have been submitted, and all taken together are but a beginning of the search for a remedy for the defects which exist in this important branch of international law.

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1. The subject is discussed in Chapter II., of this study.
2. Ibid., Chapter III.
3. Ibid., Chapter IV.
4. Ibid., Chapter V.
5. Ibid., Part II., Chs. VI., VII., VIII.
6. Lawrence, International Law, p. 365. See Chapter II., of this study.
7. Annuaire, De L'Institut De Droit International, 1912, pp. 648-650. See Chapter II., of this study for discussion. For an English translation see the American Journal of International Law, Vol. VII., pp. 153 ff.

Chapter II.

TREATIES WHICH ARE ANNULLED BY WAR

Early Views and Practices

The early writers on international affairs who held to the theory that the state is the product of a social contract, likewise maintained that war annulled all laws, treaties, and agreements previously existing between the belligerent states. Man reverted to his former state of nature in which no recognized rights, except the right of force, existed. A modern writer says, "These early writers admitted a perpetual state of nature in which 'all were again all'"; and further, "A state of peace could exist only in virtue of express conventions. When two states were at war they reverted to the state of nature and neither recognized any rights of his adversary. They admitted that in war all rights of law, treaties etc. ceased to exist and physical force ruled supreme."[1]

It was customary among these older nations for each belligerent, at the outbreak of war, to make a public and solemn proclamation that all obligations of treaties between them had ceased. A survival of this custom is found in the Russian declaration of war upon England, 1807, when the Czar declared that all treaties existing between the two powers were abrogated;[2] and the declaration made by France, 1914, that all treaties existing between France and Germany were annulled and without effect. At a later date the general rule that war *ipso facto* dissolved all existing treaties between belligerents was common.[3]

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[1] Bluntschli, *Droit International Codifié*, (French trans.,Lardy), p.307, Note 1.

[2] Martens, *Recueil*, Vol.VIII., p.707.

[3] Phillimore, International Law, Vol.III., p. 794.

Later writers made the survival of treaty rights dependent upon the origin of the war: If the war arose from a breach of the treaty, the treaty was annulled; but if the war was what is called a new war, that is, one arising from a cause independent of the treaty, the rights provided for in the treaty would be interrupted but not lost.[1]

Some of the more recent writers maintain that war abrogates only those treaties the existence of which is incompatible with belligerent relations.[2]

An examination of the practice of belligerent nations shows that each of these theories has, at times, been dominant; but the practice of the twentieth century, although irregular and indefinite, has been to maintain treaties between the belligerent powers, and, with many exceptions, treaties existing at the outbreak of war are only suspended during war and revive in their operation at peace.

The Doctrine of Annullment

Vattel remarks, "The conventions and treaties made with a nation are broken or annulled by a war arising between the contracting parties, either because these compacts are grounded on a tacit supposition of the continuance of peace or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaties."[3]

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[1] Wheaton, Elements of International Law, p. 353; also Vattel, Le Droit Des Gens, Vol. IV., Ch. 4, p. 42.

[2] Phillimore, Vol. III., p. 795 (Quoting De Martens).

[3] Le Droit Des Gens, Vol. III., p. 51.

"As a general rule," Kent says, "the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever, unless revived by a subsequent treaty: But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place."[1]

Similarly, Fiore says: "As to treaties between belligerents, it cannot be admitted that the state of war extinguishes them all, but only such as are incompatible with that state."[2]

The reasoning set forth by the above writer is repeated by the Spanish publicist, Riquelme, who observes further that war annuls "all the treaties which form the international legislation between the belligerent states," and that "the reason why these treaties perish by war is because they are made with reference to peace; and, since it is lawful to take possession of whatever belongs to the enemy government, with greater reason it is proper to deprive it of rights which grow out of the treaties."[3]

Olmeda, another Spanish publicist, holds to the view that "war annuls all existing treaties between belligerents."[4]

Calvo, with some hesitation, ranks himself with that school of thought: "The rupture of peace", he says, "annuls all diplomatic engagements previously entered into by the belligerent states."[5]

Phillimore takes the same view, but makes many exceptions. He seems to consider that treaties which "recognize a principle and object of permanent policy" remain in operation; and that those which relate "to objects

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1. Commentaries, Vol. I., p. 176.
2. Droit International Public, Vol. III., p. 83.
3. Moore, Digest of International Law, Vol. V., p. 384.
4. Direcho publico de la paz y de la guerre, Vol. I., p. 267; Jacomet, La Guerre et Les Traités, p. 114.
5. Droit International, Vol. I., p. 678.

of passing or temporary expediency" are annulled.[1] Likewise, Twiss may be classed with these publicists. His view corresponds more nearly to that of Calvo and Vattel.

This ancient doctrine that war annuls all treaties existing between the belligerent parties still has some partisans. This theory has been abandoned by most publicists, but authorities are by no means agreed on the question, whether the abrogation of treaties as a consequence of war is the rule or the exception.

The Meaning and Classification of Treaties

Much confusion of terms and thinking has resulted from a lack of an adequate understanding regarding the meaning of the term "treaty". Wheaton divides the general compacts between nations into "Transitory conventions and Treaties properly so termed". The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty or form of government of the contracting parties; and, although their operation may, in some cases, be suspended during war, they revive on the return of peace, without any express stipulation. Such are treaties of cession, boundary, and exchange of territory, and those which create a permanent servitude in favor of one nation within the territory of another.[2]

"Treaties proper" are understood to mean compacts which look to future action, and the execution of which presupposes the continuance of a state of peace between the contracting parties.

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1. International Law, Vol. III., p. 530.
2. Elements of International Law, p. 332 (Lawrence edition).

Continuing, Wheaton says, "Most international compacts, and especially treaties of peace, are of a mixed character and contain articles of both kinds; which render it frequently difficult to distinguish between those stipulations which are perpetual in their nature and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things.[1]

Perhaps the most scientific classification of treaties is that made by Chief Justice Marshall.[2] He divides them into executed treaties on the one hand, and executory, on the other. Examples of executed treaties are boundary treaties, treaties of cession, and those clauses which create servitude. Examples of executory treaties are treaties of alliance, guarantee, commerce, extradition etc.

Controversies Over Treaty Interpretations

As a result of the double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side, and denied on the other; when in reality the word was used by the parties in different senses: by the one, in its usual sense; and by the other, in its special and restricted sense.[3]

For example, in the controversy between the United States and Great Britain as to the effect of the War of 1812 on "the liberties" to be enjoyed by American fishermen in British dominions in North America, as de-

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1. Elements of International Law (Lawrence edition), pp. 343-344.
2. Fletcher v. Reed, 6 Cranch 136. Cited by Taylor, p. 367.
3. Moore, Columbia Law Review, Vol. I., pp. 209-23.

fined in the Treaty of 1783, John Quincy Adams contended that the Treaty of 1783 was not, in its general provisions, one of those which, by common understanding and usages of civilized nations, could be considered as annulled by a subsequent war between the parties. To this contention Lord Bathurst, on October 30, 1815, replied: "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties." Nevertheless, Lord Bathurst, in the same note, declared that the Treaty of 1783 contained irrevocable provisions and others of a temporary character. From which Professor Moore remarks, "We may assume that if the treaty had been composed wholly of provisions deemed by his Lordship to be of the former character, there would have been no controversy between him and Mr. Adams."[1] During the negotiations which followed Great Britain never entirely abandoned her original position, and the United States may be said to have acquiesced in it. By it they secured the exclusion of Great Britain from the Mississippi, the free and open navigation of which was granted to the subjects of Great Britain forever by the treaty which Lord Bathurst set aside.

In a controversy with Great Britain over the Nootka Sound Convention, Mr. Buchanan, Secretary of State, informed the British Minister, Mr. Packenham, that "The general rule of national law is that war terminates all subsisting treaties between the belligerent powers. Perhaps the only exception to this rule, if such it may be styled, is that of a treaty recognizing certain sovereign rights as belonging to a nation which had previous-

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[1] Moore, Columbia Law Review, Vol. I., p. 217.

ly existed independently of any treaty engagements. It will scarcely be contended that the Nootka Sound Convention belongs to this class of treaties."[1]

In his reply Mr. Packenham stated that "The Nootka Sound Convention embraced, in fact, a variety of objects: It partook, in some of its stipulations, of the nature of a commercial convention; in other respects it must be considered as an acknowledgment of existing rights, an admission of certain principles of international law, not to be revoked at the pleasure of either party, or to be set aside by a cessation of friendly relations between them."[2]

It is quite evident that a treaty is not an indivisible whole, and where it deals with a variety of matters, it is entirely within the bounds of possibility that some of its provisions will be merely suspended, others annulled, and still others unaffected by war.

The General Character of the Problem

It is impossible, under existing conditions, to distribute treaties arbitrarily into distinct classes, so as to be able to lay down with certainty the precise effect which war will have upon every particular treaty. The factors which determine the effect are: subject matter of the treaty, the parties to it, and the permanent or temporary character of the objects it was designed to achieve. This is made all the more impossible because in the practice of nations no well established and definite rules have been followed. Often the whole situation is determined by the conquering nation, which dictates arbitrarily the terms of peace without regard to precedent.

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1. 34 British and Foreign State Papers, 93, 97.
2. *Ibid.*, 102.

Hall says, "Treaties concluded between the belligerent states only, whether with political objects or not, which from the nature of their contents do not appear to be intended to set up a permanent state of things, such as treaties of alliance, commercial treaties, postal conventions, etc., may be considered to be annulled or at least suspended during war."[1]

This general view seems to be held by most of the modern writers on international law.[2]

The following statement presents a more universal view of the same subject: "Agreements that contemplate the continued existence of normal peaceful relations between the parties, such as those, for example, which regulate commercial intercourse, tariff concessions, immigration and naturalization treaties, postal conventions, extradition agreements, and the like, are obviously deprived of their obligatory force by the outbreak of war."

On the other hand, some writers adopt a more advanced view and maintain that "War does not, per se, in any sense transfer men into a state of primitive nature in which all treaty rights and laws are lost." F. de Martens says: "In our day war only suspends contractual engagements between belligerents, and this when their application becomes impossible, and as a general rule only treaties having a political character are suspended."[3] Dudley Field, Merignhac, and a few others adopted this advanced view, but nations in their practice have not been in harmony with it.[4]

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1. International Law, p. 381.
2. Bonfils, Droit International, p.538; Moore, Digest, Vol.V., p.372; Walker, The Science of International Law, p.327; Westlake, International Law, Vol. I., pp.294-298; Lawrence, International Law, p.362; Davis, Elements of International Law, p.239; Wheaton, p.332; Crandall, Treaties, Their Making and Enforcement (2nd ed.), p.451; Hershey, Essentials of International Public Law, p.361; Taylor, International Law, p.461; Jacomet, La Guerre et Les Traités, p.180; Phillimore, Vol. III., Ch.11; Halleck, International Law, Vol. I., pp. 314, 597.
3. La Paix et la Guerre, p. 204.
4. Projet d'un Code Int., Art.905; Lois et Coutumes de la Guerre sur Terre, p. 58.

Some Special Examples

Treaties of alliance, of succor and subsidy, of commerce and navigation- in fact all stipulations having reference exclusively to pacific relations- according to the practice of the nineteenth century, cannot be said to subsist after such relations have become hostile; nor is a positive declaration of war necessary to produce this result. In the difficulties of the United States with France, in 1798, no public war was declared, but the two states were regarded as in hostile relation to each other, and the subsisting treaties were held to be dissolved.[1]

As a usual thing, however, such unilateral acts as the above were modified by the second party or by conventions. Toward the close of the century and to the close of the Napoleonic wars the custom of states in convention or in a declaration of war was to abrogate individually their relations with other states. By the French Convention of March 1, 1793, all treaties of alliance and commerce with powers which were at war with France were annulled.[2] And in the Czar of Russia's declaration of war against Great Britain on October 26, 1807, the Emperor declared that he annulled forever all acts previously concluded with Great Britain, and especially the convention made June 3, 1801.[3]

In the British-Venezuelan protocol, signed February 13, 1903, for the adjudication of claims of British subjects against Venezuela, it was expressly agreed that "inasmuch as it might be contended that the establish-

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1. Halleck, International Law, Vol. I., p.314.
2. Martens, Recueil, Des Traités, Vol. V., p.191.
3. Ibid., Vol. VIII., p.707.

ment of a blockade of the Venezuelan ports by the British naval forces had ipso facto created a state of war between the two powers, the existing treaties between the two countries had been abrogated." The Italian protocol with Venezuela contained similar provisions.[1] The German-Venezuelan protocol made no such provisions.

It may also be noted that in the treaty of commerce concluded between the United States and China on October 8, 1903, after the Boxer Uprising of 1900, it was expressly agreed that all of the provisions of the several treaties between the two countries which were in force on January 1, 1900, continued in force and effect, except so far as modified by the new treaty or the treaties to which the United States was a party.[2]

Treaties Classified as Affected by War

Efforts have been made to lay down a general rule based upon the practice of states and the views of publicists with regard to the effect of war upon treaties. From the diverse views and practices it seems impossible, at the present time, to state a rule of general international application in that regard. However, it seems safe to say that the beginnings of such a rule can be gleaned from the practice of the belligerents- not only before the outbreak of hostilities, but during their continuance.

Lawrence[3] has drawn up a table showing the effect of war upon treaties. In this outline he divides treaties into two general classes: 1, Treaties to which other powers besides the belligerents are parties; and 2, Treaties to

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1. Article VIII.
2. Article XIII.
3. International Law, p. 365.

which the belligerents alone are parties. Under the first heading he has listed: (a) great international treaties; and (b) ordinary treaties to which one or more powers besides the belligerents are parties.

Under the first of these subdivisions, in one instance only- when the war arises out of the treaty- may a treaty be abrogated, and this will depend upon the will of the signatory powers.

Under the second subdivision (b), the effect depends upon the subject matter, and is generally suspended or abrogated with regard to belligerents and unaffected with regard to third parties; while under the second general division treaties of alliance only are abrogated. Here, again, we find a departure from the rules of practice and but few publicists hold to the same exact view. The rule is not definite.

The most recent international attempt at laying down specific rules governing the status of treaties existing between governments engaged in hostile relations was made by the Institute of International Law, at its session in Christiania in August, 1912.[1] The rule of the Institute is embodied in eleven articles, which are grouped in two chapters. The general proposition was laid down that the existence of war does not *per se* impair the binding force of treaties previously concluded between the belligerents, but many exceptions to the rule are made. Among those treaties which the Institute holds to be terminated are those creating "international associations, protocols, including agreements in respect to the supervision of external or internal affairs, treaties of alliance, guaranty and

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[1] *Annuaire, De L'Institut de Droit International,* Vol. XXV., pp.648-650: English translation in American Journal of International Law, Vol. VII., pp. 153-154.

subsidy, to which are added treaties establishing spheres of influence", and finally, treaties of a "public nature generally". Abrogation also takes place in respect to any treaty the operation of which has been the direct cause of the war, as evidenced by the official act of either belligerents prior to the outbreak of the war.

The project submitted by the Institute of International Law does something to clear up the situation, yet it is open to criticism because of its indefiniteness. Two points in question may be noted. The term "treaties of a public nature generally" is a term of general application, and may be considered to include all or most international undertakings within its scope. Nor does it designate the nature and character of the "associations" which are terminated by the outbreak of hostilities between the signatory parties, thus leaving open much room for criticism.

Practices of States

Let us now examine the practices of states in their diplomatic and treaty relations. Each individual state pursues its own course, apparently following the path of least resistance, and often the conquering state dictating the terms most advantageous to its own interests, without regard to precedent or established rules.

In his annual message of December 7, 1847, President Polk took the ground that a state of war abrogates all treaties previously existing between belligerents, and that a treaty of peace puts an end to all claims for indemnity for tortious acts committed under the authority of one gov-

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ernment against the citizens or subjects of another, unless especially provided for in its stipulation. The Mexican Government accepted this rule, and in the treaty of peace of February 2, 1848, it is provided that "the previously existing treaties between the two countries are now revived."[1]

By a decree of April 24, 1898, the Spanish Government declared that the war then existing with the United States had terminated all agreements, compacts, and conventions between the two countries. The principal treaties in force between the United States and Spain at the time of this declaration were the treaty of peace and amity of October 27, 1795, and the Treaty of Madrid of February 17, 1834, under which an indemnity was provided for certain claims of citizens of the United States against the Spanish Government, the full amount of which had not been paid at the time of the proclamation. The treaty protocol of January 12, 1897, was also included in the decree.

It may be noted that the above act was unilateral and the United States Government refused to accept the decree as final; and Article XXIX of the treaty of amity and general relations between the two governments signed at Madrid on July 3, 1902, states that "all the treaties, engagements, conventions and contracts between the United States and Spain concluded before the Treaty of Paris are expressly abrogated and annulled, with the exception of the treaty of 1834."[2] The Spanish contention for the old doctrine was not admitted, however, and the treaties existing between the two countries at the outbreak of war were abrogated- not by war, but by special treaty signed three and one-half years after the treaty of peace was signed.

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[1] Article XVII., Richardson, Messages and Papers of the Presidents, Vol. IV., pp. 532 ff.

[2] Revue Générale de Droit International Public, 1898, pp.676 and seq.

Very early the custom was established for the parties to expressly agree in the treaty of peace as to the renewal of some treaties existing between them at the outbreak of the war. This practice, though not uniform, was the outgrowth of the early practice of considering all treaty relations annulled by the outbreak of war.

Article XXI., of the Treaty of Rotschild, signed February 26, 1658, states that all treaties previously existing between the high contracting parties, principally those of Stettin, Broneseboroo, and Frederick, are confirmed.[1] The Treaty of Copenhagen of May 27, 1660, stipulates that all anterior treaties are confirmed.[2]

Prior to the French Revolution the express renewal regularly embraced in its terms all treaties between the parties of an executed, as well as of an executory character, not inconsistent with the new treaty of peace concluded since the Treaty of Westphalia.[3]

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[1] Ourousow, <u>Recueil des Traités</u>, p. 19, cited by Jacomet, p. 74.
[2] <u>Ibid</u>.
[3] Article II., of the Treaty of Paris, February 10, 1763; "The Treaty of Westphalia of 1648; those of Madrid between the crowns of Great Britain and Spain of 1667 and 1670; the treaties of peace of Nimeguen of 1678 and 1679; of Ryswyck in 1697; those of peace and commerce of Utrecht of 1713; that of Baden of 1714; the Treaty of the Triple Alliance of the Hague of 1717; that of the Quadruple Alliance of London of 1718; the Treaty of Peace of Vienna of 1738; the definitive Treaty of Aix la Chapelle of 1748; and that of Madrid, between the crowns of Great Britain and Spain, of 1750; as well as the treaties between the crowns of Spain and Portugal of February 13, 1668; of February 6, 1715; and of February 12, 1761; and that of April 11, 1713, between France and Portugal, with the guarantee of Great Britain .... as well as all the treaties in general which subsisted between the high contracting parties before the war" were renewed and confirmed when not inconsistent with the new treaty, as if inserted word for word.- Chalmers Collection of Treaties, Vol. I., p. 470, cited by Crandall, Treaties, Their Making and Enforcement, p. 442.

This practice of renewing former treaties en bloc was not universal. Some treaties of peace annul en bloc all previous engagements, as in the Treaty of Nimeguen between France and Spain.[1] Then again, in many treaties of peace neither clauses of renewal nor of confirmation of past treaties are found, so that by tacit understanding all previous engagements are considered annulled. Such was the Treaty of Amiens of March 27, 1803; the Treaty of Tilsit of July 7, 1807; and the Treaty of Vienna, of 1809.[2]

Nineteenth Century Practices

During the nineteenth century there was a tendency on the part of publicists to break away from the ancient rule that war abrogates treaties between the belligerents. But the leading diplomats of Europe and Asia were not ready to accept fully the new doctrine. In the treaties of peace signed between the larger powers we find an effort on the part of some nations to maintain or re-establish pre-belligerent engagements; but at the Conference of Vienna, 1855, Bourqueny, a French delegate, reaffirmed the rule that all treaties are annulled by war. Bismarck took the same view.[3] Several of the leading English men of state held to the extreme view throughout the century, and they, with Spain- who, by her celebrated decree of April 24, 1898, solemnly declared abrogated all existing treaties between the United States and herself- stand as examples of the old idea. In the Paris Conference on March 25, 1856, Count Walewski observed that, the state of war having invalidated the treaties which had existed between

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1. Jacomet, p. 76.
2. Ibid., p. 78.
3. Ibid., p. 129.

Russia and the belligerents, it was proper to insert a provisional stipulation as to commercial relations of the parties.[1]

During this period we find the ancient rule to be dominant, as is indicated by the peace treaties. There are but few instances in which the treaty of peace is silent regarding the re-establishment or confirmation of previous commercial peace relations. By the treaty of peace of August 28, 1816, between the Low Countries and Algeria it was specifically asserted that all articles of amity and peace entered into before 1757 between the contracting parties should be renewed and confirmed as if "written word for word in the present treaty".[2]

In the treaty of February 22, 1828, between Russia and Persia it was considered that all obligations of former treaties had ceased, and they were replaced by the present clauses and stipulations.[3] In the treaty of peace between Turkey and Persia, July 28, 1823, the former treaties were re-established; and again in September, 1829, Russia and Turkey concluded[4] a peace treaty in which it was declared that all former treaties were renewed and each party agreed to observe them most religiously and permanently.[5]

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1. British and Foreign State Papers, 17, 99.
2. Jacomet, p. 129, Article I.
3. Ibid., Article II.
4. Martens, Nouveau Recueil, VI., p. 272.
5. Ibid., VIII., p. 151.

Period of Transition

Following the period of the Napoleonic wars Western Europe enjoyed a period of forty or fifty years of peace, and during this time a tremendous transformation in the political life of the nations took place, and the peace treaties signed at the conclusion of the numerous wars of the latter half of the century are, for the most part, of a different character from those of former periods. The general custom of considering all former commercial and peaceable agreements annulled prevailed. In most instances a statement was made re-establishing all former agreements "not incompatible with the present stipulations", which stipulations were those of commerce, intercourse, immigration, and naturalization, and other normal relations which, in all but a few treaties, were recognized as annulled.

Peace Stipulations

The following general review of the effect of war upon treaties, as shown in the peace stipulations, indicates a tendency toward a general suspension of previous agreements rather than their abrogation on the outbreak of war.

The treaty of peace between the United States and Mexico, in 1848, provided that the Treaty of Navigation and Commerce between the two countries of April 5, 1831, was thereby "revived".[1] The treaty of peace between Austria and Sardinia, signed at Milan, August 6, 1849, stated that all treaties between the two governments before the outbreak of the war were renewed so far

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[1] Article XVII.

as not altered by that treaty.[1] The treaty signed at Berlin, July 2, 1850, between Prussia and Denmark re-established all former treaties.[2]

In the Treaty of Paris of March 30, 1856, at the close of the Crimean War, it was expressly stipulated that, until the treaties or conventions which existed before the war between the belligerent Powers had been either renewed or replaced by new agreements, trade should be carried on in accordance with the regulations in force before the war.[3]

The Treaty of Zurich of November 10, 1859, between Austria, France, and Sardinia confirmed, as between Austria and Sardinia, the treaties in force at the outbreak of the war so far as compatible with the new treaty.[4] As between Austria and France there was no such renewal. In the treaties of Vienna of October 30, 1864, signed between Austria, Prussia, and Denmark; of Prague, signed August 23, 1866, between Austria and Prussia; and of Vienna, October 3, 1866, between Austria and Italy, provision for temporary or permanent renewal was made.

In the Treaty of Frankfort of May 10, 1871, at the close of the Franco-Prussian War, it was agreed that, the treaties of commerce with the different Germanic states having been annulled by war, the two governments would adopt as the basis of their commercial relation reciprocal most favored nation treatment.[5] Treaties existing before the war were revived by a convention signed December 11, 1871.[6]

In the Treaty of San Stefano, signed March 3, 1878, between Russia and Turkey, it was provided that all treaties of commerce and navigation and

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[1] Article II.
[2] Article II.
[3] Article XXXII.
[4] Article XVII.
[5] Article XI.
[6] Article XVIII.

those relative to the status of Russian subjects within Turkish dominions, which had been abrogated by the war, should come into force again, so far as compatible with the new treaty.[1] In the treaties of peace signed October 30, 1883, between Chile and Peru, and of April 4, 1884, between Chile and Bolivia, provision was made for a return to former relations on a most favored nation basis in their commercial relations.

In the treaty of peace between China and Japan, signed April 17, 1895, it was recognized that all treaties between the two powers had, in consequence of war, come to an end, engagements being made whereby new treaties of commerce and navigation were entered into and ratified.[2]

By the close of the nineteenth century the practice of renewal in the peace treaty of former treaties and of establishing new commercial and other treaties which were incompatible with the state of war had become the rule.

Early Twentieth Century Practices

Beginning with the twentieth century some of the peace treaties are silent regarding the re-establishment and confirmation of former treaties, indicating that the contracting powers considered that the state of war suspended, for the time being only, but did not annul treaties existing between the parties before the war. However, in most cases we shall find that treaties were considered as annulled by the outbreak of war when established to meet the normal conditions of peace. Likewise, other treaties were reaffirmed by special stipulation.

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1. Article XXIII.
2. Article VI.

In the treaty of peace between Russia and Japan concluded at Portsmouth on September 5, 1905, it was provided that, since the treaty of commerce and navigation between the two countries had been annulled by war, the parties would recognize the most favored nation treatment as the basis of their relations.[1] In the treaty of peace between Italy and Turkey signed at Lausanne October 18, 1912, re-establishment of all former relations was made.[2] No provision was made for the renewal of former obligations in the treaty of peace signed between Turkey and the Balkan Allies May 30, 1913,[3] or in the treaty of peace between Bulgaria and Roumania, Greece, Montenegro and Servia, signed at Bucharest on August 10, 1913.[4]

The treaty of peace between Bulgaria and Turkey signed at Constantinople September 29, 1913, contained a provision that the two contracting parties bind themselves to "put back into force" immediately after signing the treaty, for a period of one year, the convention of commerce and navigation of February 19, 1911, and the consular declaration of December 2, 1909.[5] The treaty of peace between Greece and Turkey, signed at Athens on November 14, 1913, provided that all treaties, conventions, and acts concluded or in force at the time diplomatic relations between the parties were broken off should be "restored in full force".[6] Similar provision was made in the treaty of peace between Servia and Turkey signed at Constantinople March 14, 1914.[7]

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1. Article XII.
2. Article V.; Martens, Recueil de Traités (3 series), Vol. VII., p.8.
3. American Journal of International Law, Supplement VIII., 12.
4. Ibid., 13.
5. Article IV.
6. Article II.
7. Article I.; Martens (3 series), Vol. VIII., p. 643.

Thus the twentieth century diplomacy has not followed the ancient practice of abrogating all treaties existing between belligerent states, and has established the rule in a general way that only executory treaties are annulled by the outbreak of war. But as to this the practice, as noted above, is by no means uniform. In the treaty of peace between Turkey and the Balkan Allies signed at Bucharest May 30, 1913, and in the treaty between the Balkan states signed at Bucharest August 10, 1913, nothing was said concerning the renewal of former obligations, thus assuming that all former agreements would be established automatically with the restoration of peace. This cannot be taken as the rule, but it would seem that the tendency is that way. The outcome of the recent war has not been in accord with this practice. At the peace conference between Germany and Russia at Brest-Litovsk in December, 1917, the German delegates proposed that all previously existing treaties between the two powers should become effective, if not directly in conflict with changes resulting from the war, and that each nation should grant to the other, for twenty years at least, the rights of the most favored nation in questions of commerce and navigation.[1]

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1. Chicago Tribune, January 3, 1918. The terms of the treaty of peace affecting the commercial arrangements between the belligerent powers are discussed in the concluding chapters of this study.

Conclusion

The above review shows very conclusively that the practice has been uncertain and irregular, and the language used shows what a strong influence the early diplomatic usages have had in modern times. But the courts are unanimous in their opinion that war does not necessarily annul all treaties. Executed treaties are considered continuous. Jurisprudence is uniform on this point. This has resulted from the evolution of the notion that war is a contest between nations. The French, English, and American courts are agreed in their opinion regarding the effect of war upon treaties dealing with individual rights and their exercise. The better view is that all treaties of commerce and amity are annulled by the outbreak of hostilities between two contracting powers.

Chapter III.

TREATIES WHICH ARE SUSPENDED BY WAR

Introduction

As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, their chief object should be to promote a friendly feeling between the people of the contracting countries, and to avoid war and secure a perpetual peace. It is the moral duty of the contracting parties to maintain inviolate their treaties. This should be done, not only in times of peace but also in war, in so far as it can be done without the sacrifice of individual rights or those principles which lie at the foundation of personal and national liberty.

As long as the sanctity and binding force of treaties is recognized, it must be conceded that war- "an interlude of savage life",[1] as defined by Westlake- cannot destroy, root and branch, ancient landmarks and those world institutions which have their roots deep in the past. And, in modern times at least, few nations have had their national identity destroyed through war. Consequently it is generally advantageous to the belligerent parties that treaties not incompatible with their war aims be considered permanent and continuing, or when their operation is made impossible, they should be re-established automatically with the return of peace. Self-preservation,

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1. International Law, Vol. II., p. 34.

with states as well as with individuals, is paramount. The outbreak of war itself will not discharge or extinguish debts or other financial obligations previously made, either between the belligerent states themselves or between one of them and the subjects of the other. This rests on the fact that such engagements are contracted on the faith of national honor.

Likewise, boundary lines are set up, cessions are granted, and servitudes created; and, in general, where a permanent state of things is provided for, the assumption is that such arrangements will not be permanently affected by the outbreak of hostilities. With some such understanding, the belligerent parties can enter into peace arrangements with little or no hesitancy- the chief task being to re-establish commercial and political relations which have been rendered incompatible or annulled by the operation of war.

Recent Views of International Bodies

It is the usual, but not uniform, practice for the belligerent parties to agree expressly in the treaty of peace as to the renewal of treaties existing between them at the outbreak of war. But without such express renewal it is now generally agreed that there are treaty obligations of such character as will survive a state of war.[1] The tribunal of arbitration in the North Atlantic Coast Fisheries case, in its decision rendered September 7, 1910, said: "International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most are suspended by it."[2] The Institute of International Law, at its session in

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1. Crandall, p. 442.
2. S. Doc. No. 870, 61st. Cong., 3'd Sess., p. 175.

Christiania in August, 1912, laid down the general proposition that the existence of war cannot be said to impair the binding force of treaties previously concluded between the belligerents. As is set forth in Article I. of the project, all treaties continue to have obligatory force in time of war save those held incompatible with belligerent conditions.[1] No doubt this comprehensive scheme, prepared by a body of the highest technical authorities in the world, will receive due consideration by negotiators in the future.

Views of Publicists

As we have observed in the previous chapter, treaties which refer to conditions of peace and pacific relations, such as treaties of friendship, are necessarily terminated by a state of war. As to treaties which are not incompatible with a state of war and which do not necessarily presume a state of peace, opinion differs. Most modern writers hold that such treaties are suspended during the time of war, but become valid and in force when the war is over.

Calvo holds that such treaties revive at the termination of the war and the establishment of peace, unless they are modified by the treaty of peace or by material changes resulting from war. A war resulting in cession of territory would naturally affect boundary and similar treaties.[2] Wheaton considers that treaties which set up a permanent state of things by an act done once for all, such as treaties of cession or boundary, or those which create a servitude in favor of one nation within the territory of another,

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1. See Chapter II., of this study.
2. Droit International, 4th ed., Vol. V., p. 381.

generally subsist, notwithstanding the existence of war; and, although their operation in some cases may be suspended during war, they revive on the return of peace without any express stipulation.[1] De Martens thinks that such treaties are always suspended and may be abrogated.[2] He contends that "there is a very important difference between transitory covenants and other treaties with respect to their duration. When once a transitory covenant has been continued afterwards without being renewed, or its future duration has been defined by the contracting parties, it still continues in force. If a war should break out between the contracting parties, the covenant does not, on that account merely, become entirely null, although the effects of it may be suspended during the war."

Halleck avers that "Stipulations which relate to boundaries, to the tenure of property, to public debts etc., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease."[3] For example, the treaties of 1783 and 1794 between the United States and Great Britain, respecting confiscation and alienage, were of a permanent character, and the supreme court held that they were not abrogated by the War of 1812, although their enforcement was, for the time being, suspended.[4]

Hall, referring to the effect of war on treaties with political objects intended to set up a permanent state of things by an act done once for all, declares that "agreements of this kind must in all cases be regarded as continuing to impose obligations until they are either suspended by a fresh agreement or are invalidated by a sufficiently long adverse prescription;"

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1. Elements of International Law, Pt. III., Ch. 2.
2. Law of Nations (Cobbetts' translation, 1795), p. 55.
3. International Law (Baker's ed.), p. 294.
4. Society for the Propagation of the Gospel v. New Haven, 8 Wheaton, 464-94 (Cited in Scott's cases, p. 428).

and he further declares that "where treaties, such as conventions to abolish the right of aubaine or to regulate the acquisition and loss of nationality may be considered as suspended during war, the effects of acts previously done under their sanction must remain unaltered."[1]

Phillimore remarks that "most writers on international topics have fallen into the error of not distinguishing between treaties temporary in their nature and treaties which contain a final adjustment of the particular questions, such as the fixing of a disputed boundary or ascertaining any contested right of property, treaties relating to private property are not abrogated."[2] Pillet thinks the view that the declaration of war annuls all treaties between the belligerents "is no longer held by anyone".[3] Bonfils says, "Treaties previously concluded between two belligerents are not necessarily annulled or suspended by a declaration of war or the beginning of hostilities."[4] Bluntschli takes the same view, and adds that "war cannot be considered as a means of abrogating conventional and general rights, but war may be a means of bringing about the execution of agreements previously entered into."[5]

Nys, having in mind the doctrine of abrogation, says, "The rule that treaties become extinct upon the outbreak of war is the exception now, and a new rule that treaties are suspended by hostilities prevails."[6] War affects the execution of treaties, but in no sense may we say that all treaties are abrogated.[7]

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1. International Law, p. 404.
2. International Law, Vol. III., p. 798.
3. Les Lois Actuelles de la Guerre, p. 77, Sec. 43.
4. Manuel, De Droit International, p. 538.
5. Le Droit International Codifié, p. 313.
6. Droit International, Vol. III., p. 53.
7. Westlake, International Law, Vol. II., pp. 32, 33.

The leading European writers, as well as the American writers, are agreed upon the rule that treaties are affected by war only in that their execution is suspended or witheld. Some exceptions to the rule are acknowledged, however, namely, when the treaty is the cause of the war; when the old treaty is incompatible with the treaty of peace; and when the former treaties presuppose by their nature the existence of amicable relations. This rule is most unsatisfactory as a means of solving the problems that may arise.

Westlake takes the position that we must consider that the "outbreak of war removes the controversy out of which it arose from the domain of law", and consequently all existing treaties between the belligerents are abrogated and must be expressly provided for in the treaty of peace. But "transitory or depositive treaties, including all those which are intended to establish a permanent condition of things", he says, "form an exception." Not only treaties of cession, boundary, recognition of independence or of a dynasty, and the like, fall under this head, but also those stipulations which confer rights intended for use in daily life and having no conceivable connection with the causes of war or peace. An example is the clause in the treaty of 1794 between Great Britain and the United States, giving to their respective subjects and citizens the right to hold and transmit land then held by them in the other country, notwithstanding their or their heirs and assigns being aliens. The treaty of 1760 between France and Sardinia, now applying to Italy, relative to the execution in either country of judgments rendered by the courts of law of the other country, is another example. Speaking further on this point, Westlake says, "During a war the rights may

be dormant for want of an opportunity to enforce them, just as boundaries may be transgressed by arms; but the peace, when concluded, is a peace with and on behalf of each belligerent state with all its known equipment of territory and permanent rights, and needs no expression to that effect." This is a decided advance over the earlier practice when all treaties were considered lost and all rights and obligations were considered at an end.

Woolsey regarded the continuance of treaty stipulations as a particular question to be decided upon with reference to the circumstances of each case and the nature of the stipulations. In his view, "all stipulations permanent in their nature survive open hostilities."[1] Oppenheim says, "Political and other treaties as have been concluded for the purpose of setting up a permanent condition of things are not <u>ipso facto</u> annulled by the outbreak of war, but in the treaty of peace nothing prevents the victorious party from imposing upon the other party any alterations in, or even the dissolution of, such treaties." Also "non-political treaties as do not intend to set up a permanent condition of things, as treaties of commerce, are not <u>ipso facto</u> annulled, but the parties may annul them or suspend them according to discretion."[2]

Lawrence,[3] Moore,[4] Wilson,[5] Hershey,[6] and all the later text writers on international law adopt the same view, with but little variation. They agree that treaties, like other rights, must be held subject to the law of conquest; but, an international conscience once established, the rules will be followed in practice.

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[1] International Law, pp. 158 ff.
[2] International Law, Vol. II., p. 108.
[3] International Law, p. 363.
[4] Columbia Law Review, Vol. I., p. 209.
[5] International Law, p. 259.
[6] International Law, p. 360.

Belligerent Parties

In this chapter we are dealing primarily with treaties to which the belligerents only are parties; but there may be treaty stipulations between the belligerents and other parties whose performance is necessarily suspended by war. France, for instance, when in 1870 she was reeling under the blows of Germany, would not have been able to make good her guarantee of the independence and integrity of the Ottoman Empire into which she had entered with England and Austria in 1856.

Ordinary treaties to which one or more powers other than the belligerents are parties are affected by war according to their subject matter. An alliance between three states would be destroyed if war broke out between two of them, whereas a commercial agreement would cease to operate between the belligerents only.[1] In general, third parties remain unaffected in their treaty rights, except where the performance of treaty stipulations is rendered impossible by the fact of war.

The practice has been uncertain and irregular in determining the results of wars upon such treaties, just as publicists and writers have not agreed upon definite rules and conclusions. But in the field of jurisprudence we find a more definite rule. The courts of the various nations have agreed fundamentally in their opinions and decisions as to the fate of treaties that existed between powers before the outbreak of hostilities. The rule prevails that treaties which establish private rights are unenforceable for the period of the war, but are revived with the establishment of peace.

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1. Lawrence, International Law, p. 362.

Treaties that are of a public nature and are permanent in their character are considered by many modern writers as suspended in their obligation during hostilities. The courts have usually sustained this rule. Under this decision we include the belligerent powers only as parties to the treaties. Another problem presents itself when a third state is a party to the treaty.[1]

Influence of the Older Practice

Although modern practice shows a marked tendency away from the old rule of annulment of treaties by hostilities, the traditions and past usages have gained such strength that it seems that there are but few instances where the plenipotentiaries have succeeded in breaking entirely away from the former customs.

This tendency to hold on to the ancient rule is shown by the special clause of peace treaties renewing former conventions. It is generally conceded that only treaties of comity, commerce, etc. are annulled, yet, to avoid uncertainty, a clause is usually inserted in the peace treaty specifically renewing all treaties which were suspended by the war.

We have an excellent example of this condition of mind expressed in the procedure in the Conference of Portsmouth, 1905, at the close of the Russo-Japanese War.[2] The plenipotentiaries of both powers agreed that the treaties of commerce were annulled by the war, and a new treaty was drawn up on the most favored nation clause basis; but as to the status of the other treaty arrangements the following discussion took place: M. de Witte, the Russian

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1. See Chapter IV., of this study.
2. Treaty of Peace of Portsmouth, August 27, 1905, Revue Générale de Droit International Public, 1905-19; also Protocols de la conférence de la paix entre le Japan et la Russia, p. 71.

plenipotentiary, remarked that war at one time terminated all treaties and conventions in force at the outbreak of hostilities, but he wished the opinion of his colleague, M. De Martens, who asserted that it was the custom to insert in the treaty of peace a special article stipulating that the treaties existing between the belligerent powers before the outbreak of war were restored to their former force. Baron Komura, the Japanese plenipotentiary, remarked that the insertion of such a clause was proof that the former treaties were considered annulled and not suspended in their force by the fact of war. And it was at this juncture that he made the proposal that the convention stipulate in the treaty of peace for a new treaty of commerce only. This proposal was adopted and their silence on the other treaties is decisive. The old formulas of specific renewal of all treaties, as Baron Komura said, "has become useless and inexact and should disappear".

An apparent advancement was made over former practices in the treaties of peace between the Balkan States, 1913. No provision for the renewal of treaties of any description was made in the treaty of peace between Turkey and the Balkan Allies signed at London, May 30, 1913,[1] or in the treaty of peace between Bulgaria and Roumania, Greece, Montenegro, and Servia signed at Bucharest, August 10, 1913.[2] The force of the existing treaties was considered suspended throughout hostilities, and revived on its conclusion.

But quite contrary to these late practices is the rule laid down by Westlake, who says, "At the peace there is no presumption that the parties will take the same view as before the war of their interests- political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to re-enter the domain of law."[3]

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1. American Journal of International Law, Supplement VIII., p. 12.
2. Ibid., p. 13.
3. International Law, Vol. II., p. 34.

However, the evidence is not all in harmony with this view. There is no doubt that the terms of peace are, to some extent, "at the disposal of the stronger", also the terms may "be unjust and obscured in the victor's mind by the excited feelings", yet there are always numerous closely allied interests that demand recognition, and the "excited feelings" are subdued by the possible future consequences.

<u>The Modern Point of View</u>

The following statement is universal in its application: "We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."[1]

Up to the present time, no universal rule is deduceable from the conduct of states at the conclusion of wars. The Treaty of Paris, which ended the Crimean War, provided that regulations in force before the war should obtain "until the treaties or conventions existing before the war between the belligerents were renewed or replaced by new agreements". In 1871, the Treaty of Frankfort revived treaties of commerce between France and Germany, making no reference to other <u>ante-bellum</u> treaty stipulations. The Treaty of Paris, between the United States and Spain, makes no reference to the <u>ante-bellum</u> treaties between the two countries, but evidently they were regarded,

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[1] The Society for the Propagation of the Gospel v. The Town of New Haven, 8 Wheaton, 464 (cited in Scott's cases, p. 432).

not only as not extinguished by the war, but as revived by the treaty of peace: for in the Treaty of Friendship and General Relations, proclaimed in 1903, all treaties and conventions prior to the Treaty of Paris were annulled with the exception of the Claims Convention of 1834, which was expressly continued in force.

In the Treaty of Lausanne, of 1912, between Italy and Turkey, the contracting parties settled the question for themselves that the war did not abrogate, but merely suspended, treaties existing at its outbreak: Article V. provided that "All the treaties and conventions and engagements concluded or in force between the two high contracting parties before the declaration of war shall again enter into immediate effect."[1]

The privileges of reciprocal registration of copyrights between the United States and Spain, reached in 1895 and given effect in the United States by the Proclamation of the President, July 10, 1895, were suspended during the period of the war of 1898-99; but, upon the proclamation of the treaty of peace, April 11, 1899, the privileges were immediately accorded by the United States to subjects of Spain without any express renewal.

When the Treaty of Amiens, in 1802, between Great Britain, France, Spain, and Holland was under discussion in Parliament, it was objected by some members that there had been an omission in consequence of the non-renewal of certain articles in former treaties securing to England certain rights. Lord Auckland answered in the House of Lords that, from an attentive perusal of the works of the publicists he had corrected, in his own mind, an error still prevalent, that all treaties between nations are annulled by war, and to be re-enforced must be specially renewed on the return of peace. "It is

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[1] Martens, Recueil de Traités (3 series), Vol. VII., p. 8.

true", he said, "that treaties in the nature of compacts or concessions, the enjoyment of which has been interrupted by the war, are thereby rendered null; but compacts which were not impeded by the cause and effect of hostilities, such as the right of fishing on the coasts of either of the belligerent powers, the stipulated right of cutting logwood in a particular district- compacts of this nature are not annulled by war."

Lord Ellenborough expressed surprise that the non-renewal of treaties should have been urged as a serious objection to a definitive treaty, and was astonished to hear men of talent argue that the public law of Europe was a dead letter because certain treaties were not renewed.[1]

The War of 1812 no more vacated the title of the United States to its common share in the Northeastern Fisheries than it vacated the independence of the states or the boundaries which separated their territories from those of Great Britain.[2]

Lord Hawkesbury, addressing Parliament upon the fisheries question, said, "It is worthy to notice that the claim of British settlers to the use of the coast and waters of the Belize for the purpose of cutting and shipping logwood and mahogany, which claim was based on a remote informal grant from Spain when sovereign of those shores, has always been asserted by Great Britain to have adhered to the British crown unaffected by intermediate wars between Great Britain and Spain."[3]

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1. Wharton, International Law Digest, Vol. III., p. 44.
2. Ibid., p. 43.
3. Ibid., p. 45.

Some Nineteenth Century Judicial Decisions

During the nineteenth century there were a number of most important decisions both in Europe and the United States which affirm the rule that war does not annul treaties of establishment, but they may, due to circumstances, be suspended for the duration of the war. The French courts are very generally unanimous in holding this rule. The Court of Turin, on January 10, 1810, ruled that the war between France and the Piedmont, in 1793, did not abrogate previously existing treaties between the two powers, but they were suspended for the time being.[1] The French Court of Cessions, on June 15, 1811, went further in its decision and ruled that a treaty of commerce between two nations is not annulled by war; but it is suspended.[2]

Political and other treaties which have been concluded for the purpose of setting up a permanent condition of things are not *ipso facto* annulled by the outbreak of war. The Tribunal of Saint Quentin, in a decision rendered October 30, 1835, held: "If war and conquest interrupt political treaties they may be considered only suspended till their enforcement is not incompatible with the state of war."[3]

In 1830 a question was raised in an English court[4] as to whether, by the 9th article of the Treaty of 1794 between Great Britain and the United States, American citizens who held lands in Great Britain on October 28, 1795, and their heirs are at all times to be considered, as far as those lands are concerned, not as aliens, but as native subjects of Great Britain. The 28th article of the treaty declared that the first ten articles should be permanent;

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[1] Jacomet, p. 87.

[2] *Recueil Générale des Lois et Traités*, 15 Juin, 1811.

[3] Clunet, *Journal de Droit International Privé*, 1888, p. 99.

[4] Sutton v. Sutton, 1 Russell & Mulne's Rep., p. 663. Scott's cases, p.437. The War of 1812 did not affect the rights of British creditors under the treaty of 1783 other than to suspend the right of selling, McNair v. Rogland (1830), 16 N.C. 506.

But the objection was made that "it was impossible to suggest that the treaty was continuing in force in 1813; it necessarily ceased with the commencement of the war, and it was further contended that the word 'permanent' as used in the article was used not as synonymous with 'perpetual' or 'everlasting', but in opposition to a period of time expressly limited." In pronouncing the decision of the court, Sir John Leach said: "The relations, which had subsisted between Great Britain and America when they formed one empire led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that its operation should be permanent, and not depend upon the continuance of peace."

Hence, the termination of a treaty by war did not divest rights of arrangement of territorial and other national rights are, at most, suspended during war and revive at peace, unless they are waived by the parties or new stipulations are made.

In 1823 the supreme court of the United States was called upon to decide as to the effect of the War of 1812 upon private rights vested under the treaty of 1783 and the treaty of 1794 with Great Britain. It held that even the termination of a treaty could not divest rights of property already vested under it. In the opinion of the court we read: "But where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold

them extinguished by the event of war. .... They do not cease on the occurrence of war, but are, at most, only suspended while it lasts."[1]

In a similar case it was held that titles to land in the United States acquired by French subjects under the sanction of the Treaty of 1778 were not divested by the abrogation of the treaty or the expiration of the Convention of 1800, following the hostile preparation of the two countries.[2]

These three leading decisions- one of an English, another of an American, and the third of a French tribunal- are uniform in upholding the doctrine that treaties which have been concluded for the purpose of setting up a permanent condition of things are not ipso facto annulled by the outbreak of war. Or, as Twiss says, "Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as peace do not cease on the occurrence of war, but at most are only suspended while it lasts; and that unless they are waived by the parties, or new and repugnant stipulations are made, they revive and come again into operation at the return of peace."[3]

Personal and Property Rights

If the laws of war give the state the right to seize the person and confiscate the property and debts of the subject of a hostile power who, under the law, is an alien enemy, and to suspend or extinguish existing contracts and deny the right or privilege to sue in its courts- that, of course,

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1. Society for the Propagation of the Gospel v. New Haven et al., 8, Wheaton, 464 (Cited in Scott's cases, p. 428). The War of 1812 did not affect the rights of British creditors.
2. Carneal v. Banks, 10, Wheaton, 181.
3. The Oregon question, p. 180; Phillimore, p. 802.

would operate as an abrogation of treaty stipulations guaranteeing these rights. A few of the older writers on public law- Bynkershoek, Grotius, and Pufendorff- upheld this doctrine. But Bynkershoek, who maintained the broad principle that in war everything done against an enemy is lawful: that he may be destroyed, though unwarned and defenseless; that fraud or even poison may be employed against him; and that a most unlimited right is acquired in his person and his property, admits that war does not transfer to the sovereign a debt due to his enemy, and therefore, if payment of such debt be not exacted, peace revives the former right of the creditor, "because the occupation which is had by war consists more in fact than in law". He adds: "Let it not be supposed that it is only true of actions that they are not condemned ipso jure, for other things also belonging to the enemy may be concealed and escape condemnation."[1]

In Brown v. United States,[2] the question arose whether the declaration in the War of 1812 with Great Britain gave the right to seize an enemy's property found on land at the commencement of hostilities, in the absence of legislative act authorizing such seizure. Justice Story, in a dissenting opinion, maintained the right of the state to confiscate debts and property found in the country, regardless of treaties. Chief Justice Marshall, in the prevailing opinion, said: "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace would seem to prove that war is not an absolute confiscation of property, but simply confers the right to confiscation. .... The proposition that a declaration of war does not in itself enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely

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1. Law Notes, October, 1917, p. 127.
2. 8 Cranch, 110.

free from doubt." Continuing, he said, "It may be considered as the opinion of all who have written on the jus belli that war gives the right to confiscate but does not itself confiscate the property of the enemy."

In a recent case in New York,[1] the question arose as to whether the state of war between the German Empire and the United States dissolved their treaty relations. The matter came before the Court on the defendant's motion to restrain prosecution on the ground that the plaintiff was an alien enemy. Adopting the doctrine of Justice Marshall in Brown v. U. S., the Court said: "It thus appears, from authoritative opinions of publicists who have written modernly on the jus belli, that war gives the right to confiscate, but does not itself confiscate property or debts of the enemy. Therefore, in the disposition of an application to expound the effect of the declaration of war lately had between the United States and the Imperial German Government a rule ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, which would be opposed to the most learned and respected opinion of modern jurists and publicists everywhere. There being no act of Congress yet passed which bears upon this subject, nor a proclamation of the President under the authority conferred upon him by the resolution of Congress declaring a state of war to exist, which confiscates enemy property within the United States upon a declaration of war, it seems to me entirely free from doubt that even an alien enemy may still sue in our courts, provided he is a resident here and entitled to the protection which the President's Proclamation extends to him. .... Moreover, if these views of the present status of public

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[1] Fritz Schulz, Jr. Co. v. Raimes Co., 164, N.Y. Supplement 454.

law in respect of the property and credits of alien enemies be not grounded upon true principle, there had been negotiated and adopted, as early as 1799 (8 Stat. 162), a treaty between the Kingdom of Prussia and the United States, which was re-affirmed by the treaty of 1828 (8 Stat. 378), Article XXIII. of which reads as follows: 'If war should arise between the two contracting parties, the merchants of either country, then residing in the other, shall be allowed to remain nine months, to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance,' etc. And Article XXIV. reads as follows: 'And it is declared, that neither the pretense that war dissolves all treaties, nor any other whatever shall be considered as annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations.' [Article I. of the treaty provided that citizens of Prussia are to have the same security and protection as natives in the country wherein they reside.] This court must take judicial notice of the public acts of the United States and its several departments, and therefore, until this treaty is denounced as nonoperative, it would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war, the right to collect their debts by whatever process or remedy the United States or its several states and territories afford, pursuant to the provisions of our Federal Constitution that the treaties of the United States with foreign powers shall be the law of the land, anything in the Constitution or laws of the several states to the contrary notwithstanding. That war dissolves all treaties between the contracting parties is a principle enunciated

by many of the legal writers upon public law; but as express promises and engagements of nations should be inviolable, and the duty of the nation is to take care that she be not engaged in anything contrary to the duties which she owes to herself and others, and as nations may in their treaties insert such clauses and conditions as they think proper to make them perpetual, or temporary, or dependent upon certain events, it is competent to agree to abandon this principle of the law of nations and to contract with a view to obviate its effect. Although the treaty may become very oppressive to one of the contracting parties, it is not thereby revoked. Its revocation or denouncement requires a public act of which the judicial courts, executives and legislative assemblies must take notice."

In Posset v. D'Espard,[1] Chancellor Lane, of the Court of Chancery of New Jersey, refused to stay a suit brought by a subject of Germany, resident in the United States, for the preservation of rights as a stockholder in a New Jersey corporation.

By Article I., of a treaty signed February, 1834, Spain agreed to pay to the United States as the balance due on account of claims of American citizens for seizures and confiscations durihg the war between Spain and her revolting colonies certain stipulated sums and interests. Interest was to be paid every six months. Certificates were duly issued by Spain to carry out the treaty, and distributed by the Government of the United States to the claimants in settlement of their claims against Spain released by the Convention. In discharge of the interest due the holders of these certificates there was paid annually, since 1847, to the Government of the United States by the Spanish Government the sum of $28,500.[2] The Convention of 1834 was not referred to in the treaty of peace of December 10, 1898, and no provision for its renewal was made.

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[1] 100 Atl., 893.

[2] Moore, Digest, Vol. V., p. 379.

On the usual date of payment in 1898 a state of war existed between the two countries, and the annual payment was not made. When this fact was brought to the attention of the Spanish Government, in 1899, after the restoration of peace, reply was made that, since the debt arose "out of a treaty which was suspended in virtue of the late war", action on it should be deferred until the important question of the renovation of the agreements celebrated between the two countries had been decided by the two governments. To this the United States Government replied that it considered the payment of the debt and the making of commercial, consular, and extradition treaties as distinct matter, since the obligation to pay the debt was made perpetual by the provision of the Convention. Subsequently Spain accepted this view and the Spanish Minister at Washington, in transmitting to the Department of State the requisite drafts, said: "The two sums of $28,500 which I have the honor to transmit to you represent the annual payments of 1898 and 1899, the Government of His Majesty having in this way fulfilled an obligation which the events of 1898 heretofore made it impossible to discharge."[1]

Great Britain likewise continued after the Crimean War the annual payment to Russia on the moiety of the Russian-Dutch loan assumed by Great Britain under the Treaty of 1815 and renewed in the Convention of 1831.

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[1] Moore, Columbia Law Review, Vol. I., p. 213.

Conclusion

The need of definite rules to guide states in determining the effect of war upon their treaties is quite evident; nevertheless, a beginning has been made toward the establishment of a uniform rule, as is shown by the work of authors, court decisions, and some peace treaties. We may be safe in assuming that in the future recognition will be made of the fact that treaties of a permanent character, and those not incompatible with the state of war will be considered as binding and continuing through hostilities, except where their enforcement is rendered impossible by circumstances arising out of the war, and the enforced suspension will automatically cease upon the return of peace. However, we must not overlook the fact that war is a contest between sovereign powers, and that the victor, according to the laws of war, may in some measure dictate the terms of peace.

Chapter IV.

TREATIES WHICH ARE BROUGHT INTO EFFECT BY WAR

Introduction

Treaties entered into in contemplation of war and for the purpose of regulating belligerent operations and in derogation of belligerent rights are binding on the parties during war. States have, from the most remote period of time, entered into treaties of this nature. Such treaties are of no force, and indeed are worthless if not binding when the state of affairs exists which was contemplated by the contracting parties.

Treaties of this character are practically suspended or dormant during peace, and it is war which calls them into active operation. The Geneva Convention of 1864, as to the treatment of the wounded, is an example of such a treaty. The Declaration of Paris, 1856, is not, strictly speaking, a treaty, but it was an international agreement as to rules regulating the conduct of naval hostilities in future wars; and as such, so long as it and other similar treaties exist, will continue to be binding on the signatories in the event of war breaking out between any of them. There are two general classes of treaties which are brought into operation upon the outbreak of war: 1, Treaties regulating the conduct of the signatory powers toward each other as belligerents, or as belligerent and neutral; and 2, the great international law-making treaties.

As to the first group, it may be noted that the belligerents only are parties to such agreements, and they will settle matters between themselves. Usually the victorious party dictates the terms of peace and may disregard

previous agreements. Yet, as Vattel, in discussing the general proposition that war annuls all treaties, says: "Here we must except those treaties by which certain things are stipulated in case of rupture- as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country, the neutrality of the town or province insured by mutual consent etc. Since by treaties of this nature we mean to provide for what shall be observed in case of a rupture, we renounce the right of cancelling them by a declaration of war."[1]

Rules Laid Down by Publicists

Westlake says: "All conventional obligations as to what is to be done in a state of war must continue in force, or they would have no operation at all. Such is the Anglo-French Convention providing for a continuance of the postal service between the two countries in the case of war between them, and such are the St.Petersburg Declaration against the use of explosive bullets, and all other conventions relating to the laws of war. Another instance is the provision in numerous treaties for the treatment which the subjects of the respective parties and their property are to receive in case of war between them."[2]

Bonfils, in speaking on the same subject, says: "Treaties concluded with war in view must be regarded as coming into force with the outbreak of hostilities: for example, such treaties as the Declaration of Paris, of April 16, 1856; the Geneva Convention of August 22, 1864; and the St.Petersburg Declaration of 1868; and all clauses of treaties which stipulate a period of time to leave the enemy territory, likewise all treaties concluded

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1. Droit des Gens, Vol. III., p. 51.
2. International Law. Vol. II., p. 32.

for the perpetual neutralization of states etc., as Switzerland, Belgium, Luxemburg, the Congo, the Suez Canal, and general international treaties concluded in view of a state of war."[1]

Lawrence observes that "Treaties which regulate the conduct of the contracting parties toward each other when they are belligerents, or when one is a belligerent and the other is neutral, come into force at the outbreak of hostilities. Cases in point are afforded by the numerous agreements giving to the subjects of each of the contracting powers the right to remain in the territory of the other should the two countries be at war, and by general stipulation for the regulation of maritime capture etc."[2]

The effect of war on all treaties of this class is to bring them into active operation. Such regulations apply not only to whole treaties but to the numerous separate stipulations in treaties dealing with several subjects.

Examples

In the Marianna Flora case we read: "Stipulations in treaties having sole reference to the exercise of belligerent rights cannot be applied to govern cases exclusively of another nature, and belonging to a state of peace."[3]

In a decree of the Spanish Government of April 23, 1898, upon the outbreak of war with the United States, it was declared that the state of war terminated all agreements, compacts, and conventions which had been in force up to that time between the two countries.[4] In Article XIII. of the treaty of

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1. Manuel de Droit International Public, p. 589.
2. Principles of International Law, p. 364.
3. 11 Wheaton, 1.
4. Foreign Relations, 1898, p. 774.

the treaty of 1795- which treaty was specifically mentioned in the decree- it was stipulated that, in case of war between the parties, merchants in the towns and cities where they resided should be allowed one year for collecting and transporting their goods and merchandise. When the Spanish Government had its attention called to this article it expressed an unwillingness to make any exception to the decree already issued, but offered to enter into a special agreement for the provisional application of the article. The United States declined the proposal on the ground that the provisions being expressly applicable to a state of war between the contracting parties were not abrogated by it, and the existing conditions were but the means of giving force to the treaty.[1]

The United States Government made a protest against Spain's threat to expel United States merchants from her territory. No decree of expulsion was issued. "If it were true that war abrogates such stipulations as Article XIII. of the treaty of 1795, they would be subject to the singular fate of ceasing to be in force whenever they should become applicable."[2]

The Purpose of International Conventions

The great international law-making treaties have had as their aim to minimize the occasions for resorting to war and to humanize its methods. Of such undertakings entered into in contemplation of war and intended, to a greater or less extent, to regulate its operations, we may note the following: The Declaration of Paris of 1856; the St.Petersburg Declaration of 1868; the Geneva Conventions of 1864 and 1906; and the Hague Conventions of

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1. Foreign Relations, 1898, p. 972.
2. Moore, Digest, Vol. V., p. 376.

1899 and 1907. In this category also falls the unratified Declaration of London of 1909.[1]

It may be contended that these great international conventions were not treaties in the strict meaning of the term; but, whether or not this contention is sound, one must admit that each one contains stipulations governing the actions of the signatory powers when engaged in hostilities. To the extent that the signatory powers are bound by the several stipulations when acting as belligerents, we are justified in considering these conventions as treaties, and binding as such, in our discussions. "Such treaties", without doubt, "are engagements to be observed, and a treaty-breaking nation is looked upon by other nations in somewhat the same way as an individual who breaks his contract."[2]

A careful perusal of these great declarations will establish the fact that war is still regarded as an indispensible factor in international life. International law, with us, still remains a _jus belli ac pacis_, as in Grotius' time. Five out of the six Conventions and Declarations framed by the first Hague Conference, and no less than twelve out of the fourteen framed by the second Hague Conference are intended to regulate war or the methods of conducting it. It might be noted that the entire weight of the conclusions is based upon the voluntary compliance with the prescribed rules.[3]

It would seem, in the light of the disregard for international agreements shown by nations in the recent war, that between states, as between individuals, some sanction other than moral is required for the repression of wrong-doing. International law has no machinery, either judicial or admin-

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1. American Journal of International Law, Vol. VII., p. 150.
2. Higgins, The Hague Peace Conference, Introduction.
3. _Ibid._, p. 3.

istrative, for compelling states at variance to submit their disputes to arbitration or to compel them to abide by their treaty agreements. To what extent, then, have nations in the past been willing to conform to the established laws of war, and what attitude may we expect them to take toward the established rules of warfare in the future?

In answer to the above question, our attention is immediately called to the regard or disregard of the laws of war in the world strife which had its beginning in August, 1914. But before examining into these conditions, we shall make a survey of the earlier conventions.

Progress of International Law

The Declaration of Paris, 1856, represents the first modern attempt at an international agreement upon the subject of maritime law, and, up to the Hague Conference, 1907, the only powers that had witheld their formal acceptance of this Declaration were the United States, Spain, Mexico, Venezuela, and Bolivia. The rules of the Convention, however, were strictly adhered to by the United States during the Civil War and also during the Spanish-American War, 1898. The rules laid down in this Convention governing privateering, neutral flags, neutral goods and blockades were generally considered as binding, and observed by the powers.

The Declaration of St. Petersburg, 1868, was the first formal agreement restricting the use of weapons of war, both in land and maritime warfare. This Declaration is by reference incorporated into the Regulations respecting the laws and customs of war on land annexed to the Convention on this subject adopted by the Hague Conferences.

For the purpose of mitigating the evils inseparable from war, to suppress the severities and ameliorate the condition of soldiers wounded in battle, the Geneva Convention was adopted in 1864. The Conference of 1868 considered the treatment of the sick and wounded in both land and naval warfare; while the third Convention of 1906 is much broader in its scope. The whole field of Red Cross activities is described, and rules laid down governing its activities.

The culmination of all these international conferences and treaties is found in the two Hague conferences of 1899 and 1907. The great majority of the nations of the world are parties to the various conventions of their conference. The fact that some small states are not parties to certain agreements does not relieve another nation of the obligation toward these conventions, as they are but the embodiment and expression of well established rules of conduct. But the question for our consideration is, what was the attitude of belligerent Powers toward these universal laws or international treaties during the late war? Were they considered as in effect and binding on all the belligerents?

Application of International Rules

During the Russo-Japanese War, the Czar, on February 28, 1904, directed the military authorities to conform their conduct to the St.Petersburg Declaration and to the Geneva and Hague Conventions. Copies of these were distributed to the troops, and, in addition, a set of instructions was issued on July 14, 1904, embodying the main provisions of the Hague Regulations applicable to troops in the field.[1]

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[1] Archives, Diplomatiques, 3d series, Vol.(93, 94), p. 500.

In Japan the Hague Convention had been proclaimed by an imperial decree in 1900. Detailed instructions covering special points of the convention were issued by the Japanese Government for the direction of the armies. An attempt was made to observe these throughout the war.[1]

During the Russo-Turkish War of 1877 the Russian Government endeavored to acquaint its soldiers with the international rules of warfare and required their obedience. The Turkish Government took no such steps, and refused to abide by the rules of the Red Cross Convention until compelled to accept its principles by the European Powers.[2]

During the Spanish-American War of 1898 the United States and Spain, though not signatory powers of the great treaties, strictly adhered to the rules laid down in the Paris Declaration, St.Petersburg Convention, and the ~~two~~ Red Cross Convention.

At the beginning of the Franco-Prussian War of 1870, each belligerent made a public declaration that the most humanitarian principles of warfare would be observed. On August 11, 1870, the King of Prussia issued his famous manifesto recognizing the St.Petersburg Declaration of 1868. He said, "I will make war upon the French soldiers and not upon French citizens." This principle was repeated many times by the military authorities. In his proclamation to the inhabitants of Nancy on the 27th of August, 1870, the Prussian Prince said, "Germany is at war with the Emperor, and not with the French." France allowed German citizens to remain undisturbed in her territory. The war was recognized as existing between the two states, and citizens in each state retained the right to carry into execution in enemy territory rights granted by previous agreements. It is true, however, that as

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1. Bordwell, Law of War, p. 332.
2. Ibid., p. 112.

the war continued military commanders applied their rules more rigorously, intense bitterness developed, and previous declarations were disregarded. And before the final peace terms were signed, the law of "military necessity", which knows no law or treaty rights, was acknowledged and enforced, and to a large degree treaties and engagements were ignored. May we not expect that similar action will be taken in future wars when national existence is threatened?[1]

The Force of Such Agreements

The work of the Hague Conferences of 1899 and 1907 is but the embodiment or codification of the well established rules of international conduct, recognized and subscribed to by the great body of the leading nations of the world. The Declaration of London, 1908-9, may be regarded as a natural sequel of, and supplement to, the Hague Conventions of 1899 and 1907. Strictly speaking, the Declaration does not possess any legal validity, as it was not ratified by any government. It is worthy of note, however, that in the Turco-Italian War and the Balkan wars it was adopted, and the rules applied even by states that had not been signatory parties to it. These belligerent Governments in each instance likewise agreed to consider the Hague Conventions regulating the actions of belligerents as in force and binding upon them. But, as in previous wars, charges and counter-charges of failure to abide by the rules agreed upon in the Hague Conventions were made, and the law of military necessity became operative in the belligerent activities.

One naturally asks the questions: Of what value are these treaties regulating the conduct of war? Will they stand the test of a life and death

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1. Jacomet, p. 138.

struggle of nations? Is it possible to formulate written rules of war that belligerents will accept as binding when military necessity demands their non-observance? The practice of states in recent wars, as cited above, bears striking witness to the power of the law under severe trial. There were complaints of breaches of the laws of war in every contest since nations have agreed upon rules to govern their conduct during hostilities. But the breaches of universally accepted rules of war agreed upon as binding and in force which have been definitely and conclusively proved to have been committed during recent years have been few.[1]

Unfortunately, the above statement does not hold good since August, 1914. The laws of war set forth in the Geneva, Hague, and other Conventions are at least morally binding on the parties to them. Those articles relating to war were made to be observed in good faith and held as binding during hostilities. That the belligerent Powers in the recent war have not conformed their actions to these stipulations will be made clear in the following chapters.

Treaties of Alliance

Another group of treaties brought into force by the outbreak of war is offensive and defensive alliance treaties. Such engagements between nations have been common as far back as we have a record of international relations. The object of such treaty agreements may be attained only when a state of war exists. Then they come into their full force and operation.

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really defensive: to a war of aggression, first commenced against the other contracting party. In the second, the ally engages generally to coöperate in hostilities against

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1. Higgins, The Hague Peace Conference, Introduction.

another power.

Some authors distinguish between treaties of general alliance and treaties of limited succor and subsidy.[1] Any difference, however, is of degree only, and does not modify our problem in the least. By 1717 the states general of Holland and Great Britain had entered into three general defensive treaties. The first of these, concluded at Westminister, 1678,[2] is typical of these early agreements.

In the preamble to this treaty the preservation of each other's dominions was stated as the cause of making it. Mutual guaranty of all they enjoyed or might thereafter acquire by treaties of peace was stipulated for. They further guaranteed all treaties which were at that time made, or might thereafter be made conjointly with any other power. They also stipulated to defend and preserve each other in possession of all towns and fortresses which did at that time belong or should in future belong to either of them; and that for this purpose, when either nation was attacked or molested, the other should immediately succor it with a certain number of troops and ships, and should he be obliged to break with the aggressor in two months after the party that was already at war should require it, they should then act conjointly with all their forces to bring the common enemy to a reasonable accommodation.[3]

Most of such engagements in modern times are interpreted by the individual nations as being defensive only. That there is not an agreement in what constitutes a defensive act may be seen from actions on the part of nations during the war beginning in 1914. In 1879 Austria-Hungary and Germany en-

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1. Vattel, Droit des Gens, Bk. III., Ch. 6.
2. Wheaton, International Law, p. 386 (Boyd's ed.).
3. *Ibid.*, p. 386.

tered into a treaty agreement, the first clause of which says: "Should, contrary to the hope and against the sincere wish of the two High Contracting Parties, one of the two empires be attacked by Russia, the High Contracting Parties are bound to stand by each other with the whole of the armed forces of their empires, and in consequence thereof, only to conclude peace jointly or in agreement." In August, 1914, Austria-Hungary declared war upon Servia. Shortly after both Austria and Germany declared war against Russia, who at the time apparently had committed no overt act. Italy, who in 1882 entered the above alliance with Austria-Hungary and Germany, elected to remain neutral, on the ground that her engagement in the case did not apply.

In 1902 the Anglo-Japanese treaty of alliance was concluded. Article II. says: "If either Great Britain or Japan in the defense of their respective interests should become involved in war with another power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other powers from joining in hostilities against its ally." Article III.: "If in the above event any other power or powers should join in hostilities against that ally, the other contracting party will come to its assistance and will conduct the war in common and make peace in mutual agreement with it." In accordance with the terms of this alliance and at the suggestion of England, Japan declared war upon Germany August 23, 1914.[1] During the Russo-Japanese War of 1904-5 France and Russia were bound by similar agreements to that of Japan and England; but, happily, neither belligerent was attacked by a second nation and these treaty agreements were not brought into force.

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[1] London Times, August 24, p. 6.

Numerous examples might be cited of such treaties, but from the above examples one may observe that such treaties are brought into their full force by war, and they are dormant or without effect until the conditions for which they were made are realized, namely, war.

Treaties of Guarantee and Neutralization

Another group of treaties which we may consider under this heading is treaties of guarantee and neutralization, in which a given territory or state waterway is protected and guaranteed against invasion and war. It may be applied to every species of right and obligation that can exist between nations, but it is most commonly applied to treaties of peace.

Treaties of guarantee vary widely both as to their form and substance. In their simplest form they are mutual agreements in which one party, for a consideration, makes assurance to the advantage of another, as in the Treaty of Tilsit,[1] whereby France and Russia guaranteed to each other the integrity of their respective possessions. In the same way all the contracting powers gave mutual guarantees at the Peace of Aix la-Chapelle in 1748, and at that of Paris in 1763.

Guarantees may be given by one or more parties for the benefit of a third, such as that entered into by France, England, and Austria, April 15, 1856, guaranteeing severally and jointly the independence of the Ottoman Empire, as stipulated in the Treaty of Paris the 30th day of March.[2] The independence of Greece was guaranteed by Great Britain, France, Russia, and Bavaria in a treaty entered into in 1832. By the treaty of November, 1855,

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1. Martens, Vol. VIII., p. 607.
2. Taylor, International Law, pp. 371-2.

Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory belonging to the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever, in consideration of a guarantee by England and France of the Swedish and Norwegian territory.[1]

A treaty of November 7, 1907, respecting the independence and territorial integrity of Norway provides: Article II., "The German, French, British, and Russian governments undertake, on the receipt of a previous communication to this effect from the Norwegian Government, to afford to that government their support, by such means as may be deemed the most appropriate, with a view to safeguarding the integrity of Norway."[2]

Contrary to the general rule that war prohibits all intercourse between belligerents, a treaty of 1848 between the United States and Great Britain provided "that in case of war between the two nations the mail packets shall be unmolested for six weeks after notice by either government that the service is to be discontinued; in which case they shall have safe conduct to return."[3]

Guarantees apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared, in 1741, in favor of the elector of Bavaria against Marie Theresa, the heiress of the Emperor, Charles VI., although the Court of France had previously guaranteed the pragmatic sanction of the Emperor, regulating the succession of his hereditary states. And it was upon similar grounds that France re-

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[1] Hertslett's Map of Europe by Treaties, pp. 863, 870.
[2] Martens, *Nouv. Recueil Géneral De Traités* (3rd series) Vol. I., pp.14ff.
[3] United States Laws, IX., p. 965.

fused to fulfill the treaty of alliance of 1758 with Austria, in respect to the pretentionsof the latter power upon Bavaria, in 1778, which threatened to produce a war with Russia.[1]

For similar reasons the treaty of alliance made with France in 1778 was annulled by the United States Government in 1798. The Revolutionary Government of France was at war with England and she called upon the United States, as her ally, for promised assistance. The United States Government refused the assistance on the ground that the object of the alliance was not involved, as the revolutionary government was in an offensive warfare against other governments; then it was argued (without effect) that the treaty of guarantee was personal to Louis XVI. and was not binding with the present government.

An early instance of the use of the guarantee is found in the treaty of peace between the Emperor and states of Germany and the king of France signed at Münster October 24, 1648. It was engaged that all parties should be obliged to defend and protect all and every article of the peace; that if any point should be violated, ... all and every one should be obliged to join the injured party and assist him with counsel and force to repel the injury. The obligations of the guarantee of this treaty formed the basis for the intervention of Austria and Prussia in the French Revolution in 1792.[2]

By a treaty signed at Paris November 20, 1815, by Austria, France, Great Britain, Prussia, and Russia, the perpetual neutralization of Switzerland was guaranteed.[3] The provisions and obligations of this guarantee have been recognized by the parties on several occasions. The neutrality of Switzer-

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1. Wheaton, International Law, pp. 383-4.
2. Wheaton, History of Law of Nations, p. 346.
3. Hertsle~~t~~t's Map of Europe by Treaties, Vol. I., p. 370.

land has never been violated by another power, consequently the treaty agreement remains dormant.

Belgium and Luxemburg

A treaty between Belgium and the Netherlands, signed at London April 19, 1839, for the establishment of permanent relations between them, in which Belgium was recognized as an independent, and perpetually neutral state, was placed under the guarantee of Austria, France, Great Britain, Prussia, and Russia, by a treaty entered into on the same day between these five powers on the one part and Belgium on the other.[1] In view of the obligations as a guarantor under this treaty, Great Britain, during the Franco-Prussian War in 1870, entered into separate agreements with France and Prussia by which she engaged, in case either party should violate the neutrality of Belgium, as guaranteed under the treaty, to use her naval and military forces to insure its observance.[2] It was on the basis of her obligations under the treat~~ies~~y of 1839 ~~and 1870~~ that Great Britain became a participant in the war August, 1914.

On May 11, 1867, a treaty was signed in London which established the perpetual neutrality of Luxemburg, under the sanction of the collective guarantee of Great Britain, France, Austria, Prussia, Russia, Italy, Belgium, and Holland. A condition was added that Luxemburg must not maintain any armed forces, and must not possess any fortress, the existing fortresses being required to be destroyed.

At the outbreak of hostilities in August, 1914, a most perplexing and unprecedented situation arose: Germany, one of the parties guaranteeing the

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[1] Hertsle~~t~~t's Map of Europe by Treaties, Vol. II., p. 997.
[2] *Ibid.*, Vol. III., p. 1887.

neutrality of Belgium and Luxemburg, under the pretext of self-defense, threw her armed forces across the borders of both Belgium and Luxemburg, under protest and resistance on the part of Belgium, and under protest from Luxemburg.

On the outbreak of hostilities between France and Germany, Great Britain asked both France and Germany whether they would undertake to respect Belgium's neutrality so long as no other power violated it.[1] The French Government gave, on the same day, a definite answer to that effect.[2] The answer from Germany was equivocal and ambiguous, and unsatisfactory. A few days later her armies were across the borders, her treaty obligations were violated. Upon an appeal from Belgium for protection under treaty rights, Great Britain declared war upon Germany, thus bringing her treaty obligations into force. An excuse offered by Germany for her action was that time and circumstances had so altered the condition of the treaty of neutralization that she was no longer bound by the stipulations. The population of Belgium had doubled, fortifications had been erected along the border, a large standing army was maintained etc.

The effect of the guarantee under the treaty of 1839 relating to Belgium was quite different from that of the treaty of 1867 relating to Luxemburg. Article II. of the treaty of 1867 says distinctly that the neutrality of Luxemburg is "placed under the sanction of the collective guarantee of the powers signing." In the event of a violation of the treaty, all the powers would be called upon for collective action. No one of the powers might be called upon to act singly. This view was accepted by England, also by two co-guarantors- Italy and Holland- who had not entered the war, and Luxemburg made no appeal to other signatory powers for protection.[3]

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1. Correspondence, No. 114, Sir E. Gray to Sir E. Goschen, July 31, 1914.
2. Ibid., No. 125, July 31, 1914.
3. Phillipson, International Law and the Great War, p. 22.

The effect of Germany's action in disregarding her treaty obligations is so universal that we may note further that she has, in failing to abide by her agreements, committed another and equally heinous offense by her act. Article I., of the Fifth Convention of the Hague Conference of 1907, to which Germany is a party, says: "The territory of neutral powers is inviolable;" and Article II. follows with the same definite prohibition: "Belligerents are forbidden to move troops or convoys, either of munitions of war or supplies, across the territory of a neutral power."[1]

On August 4 Herr von Bethmann-Hollweg, the German Chancellor, said, in the course of his speech in the Reichstag: "We are now in a state of necessity, and necessity knows no law. Our troops have occupied Luxemburg, and perhaps are already in Belgium. Gentlemen, this is contrary to the dictates of international law." On the same day Herr von Jagow, the Secretary of State, declared that Germany was "obliged" to violate Belgian neutrality- a neutrality that had been guaranteed by herself- in order to advance on France by the quickest and easiest route, and that this was "a matter of life and death" to her. To this declaration Sir Edward Goschen, the British Ambassador in Berlin, replied "that it was also a matter of life and death to Great Britain to preserve her solemn engagement."[2]

It is perfectly clear that, so far as Great Britain was concerned, she was compelled to intervene. There was no other course open to her but to go to war, in order to fulfill her engagement under the treaty of 1839, to defend the integrity of Belgium and the public law of Europe against a co-guaranteeing power who, acting without law under military necessity, had violated her own guarantee and the public laws of Europe.

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1. Higgins, The Hague Peace Conference, p. 281.
2. Phillipson, International Law and the Great War, pp. 27-28.

Waterways Guaranteed

Waterways are likewise guaranteed by treaty agreements, which agreements are in the form of a treaty. For such treaty guarantee to come into force in full a violation of the rules guaranteed must take place and war prevail. Or, in other words, such treaty stipulations are dormant in peace, but come into force during war.

On October 25, 1887, Great Britain and France invited the other European nations to join them in securing the neutralization of the Suez Canal. The Convention was signed at Constantinople October 28, 1888. The canal is open to all nations on terms of entire equality in peace and war. But belligerents are forbidden to embark or disembark along the canal or in its ports of access, troops or materials of war. Likewise, one belligerent's war vessel may not pursue another belligerent's vessels through the canal until after an interval of twenty-four hours after the first belligerent vessel has sailed. The canal cannot be blockaded. Hostile actions are forbidden within the zone.[1]

The Hay-Pauncefate Treaty, concluded November 18, 1901, between Great Britain and the United States, neutralizes the Panama Canal. The basis of neutralization is substantially the same as for the Suez Canal. The United States assumes the exclusive right of the management and enforcement of the terms of the treaty of neutralization, and by implication in this treaty and by the provisions of the treaty of 1903 with Panama, may build fortifications and use military force for its protection.[2]

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1. Woolsey, International Law, p. 499.
2. Treaties and Conventions, Malloy, Vol. I., p. 782.

These treaties, however, may be reckoned among the great international law-making treaties, as the rules laid down in the conventions are universal in their application as far as the waterways are concerned.

The Argentine Republic and Chile, by their treaty of July 23, 1881, declared in Article V.: "The Straits of Magellen are neutralized forever, and their free navigation is guaranteed to all Flags."[1]

In like manner, the Lower Danube was neutralized March 13, 1871. Neutralization, according to Bonfils, includes an arrangement whereby protection is sought against hostile attack or interruption.[2] But the term has come to be used in a less restricted sense: even fortifications are removed from the water courses. The less strict sense of the term guarantees against the violation, by force of arms if necessary.

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1. Moore, Vol. V., p. 268.
2. Droit International Public, p. 273.

Chapter V.

TREATIES UNAFFECTED BY WAR

Introduction

"War", wrote Rousseau, "is not a relation existing between men, but it is a relation between states in which the individuals are enemies by accident, and not as men nor as citizens but as soldiers; not as members of a party but its defenders. And finally each state may have for its enemy only other states."[1] "This", says Westlake, "is unfortunately only a prophecy."[2] Without doubt, it is assuming too much to contend, even at the present, that war does not affect individuals and their rights within the territory of the belligerent parties. However, modern practice, as well as laws, must recognize certain fundamental basic principles which are permanent and universal and unaffected by war. The individual cannot exist without the state, nor can the state exist without the individual. And, as the legitimate purpose of war is to compel states, through force, to abide by the principles of general international agreement, no state can, while engaged in war, afford to ignore the rules of international law.

"The operations of war ought to be directed exclusively against the forces and the powers of war of the enemy state, and not against its subjects such that they will not become a part of the war,"[3] says Martens. It is evident that war must be so conducted that at its close there will be some

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1. Social Contract, Book I., Ch. 4.
2. Chapters on the Principles of International Law, p. 281.
3. Nouveau Recueil Générale, 2nd series, Vol. III., p. 216.

certain fundamental relations which have been considered as in force throughout, upon which the new relations to be established may be built.

Among these permanent relations which should remain in force throughout the war may be mentioned transitory treaties, or agreements which have set up a permanent state of things, such as treaties of cession, boundary, independence, neutrality and the like. Another group of treaties in which third parties are interested that remain in force as between each belligerent power and the third parties may be mentioned, i.e., international unions and conventions. In the following pages we will examine these proposals and seek to determine what the practice of states is, as well as the attitude of the publicists and of judicial authority.

Treaties Between Three or More Parties

Treaties between three or more parties are unaffected by a war between two of them as touching the obligations of either of them to the non-belligerent party or parties. This view is not universally accepted, but in most cases dealing with the general subject of the effect of war upon treaties we find a difference of opinion, and there are no well established rules. Most of the recent writers accept this view- some with hesitation. Writing in 1898 upon the subject, M. Pillet said, "We have thought for a long time that the declaration of war ought to have the effect of dissolving all treaties existing between the belligerent parties. This sentiment is not prevalent to-day. I consider that the state of war is not incompatible with a certain existence of rights between enemy nations."[1]

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[1] Les Lois Actuelle de la Guerre, pp. 77-78.

The outbreak of hostilities between some of several contracting parties affects the mutual rights of the belligerents only, the rights and obligations of the remaining parties standing unimpaired. From the essential obligation of a treaty, no one party can liberate itself or others from the contract without the assent of the other contractors. A declaration was formally adopted in a conference of European states in London, 1871, that it was an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty or modify the stipulations thereof except with the consent of the contracting powers by means of an amicable arrangement.[1]

Belligerent Parties Only

Where the belligerents only are parties to the treaty a new situation arises. Those treaties which are transitory or have set up a permanent state of things continue, as stated above, in force and unaffected.[2] Boundary conventions and treaties of cession are examples. War has no effect upon them; they remain unchanged in spite of it. The boundaries may be readjusted in consequence of war, but until the readjustment is effected by a treaty of peace or by complete conquest, the old territorial distribution remains legally in force.

However, "If a war supervene upon a treaty, and the stipulations of the treaty are not connected in any way with the cause or objects of the war, these stipulations must be taken as standing unaffected between the belligerents."[3] Then again, if the war arise otherwise than out of the terms of the

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1. Phillipson, International Law and the Great War, Introduction.
2. Lawrence, International Law, p. 362.
3. Walker, The Science of International Law, p. 326.

treaty itself, certain of the treaty stipulations may be prevented from being performed. On the other hand, if the war arises directly from the terms of the treaty itself, it will vary with the varying facts and circumstances, and each belligerent will decide for himself as to his status.

International Congresses

"When states assemble in a universal congress", says Heffter, "or simply a general European congress, and they agree upon certain dispositions, these become obligatory upon the contracting parties, and war following between two of them should not affect the third parties to the contract."[1]

Great European territorial settlements and dynastic arrangements, intended to set up a permanent state of things by an act done once for all, in which the belligerent parties have contracted with third powers as well as with each other, are unaffected by the fact of war.[2] Thus in 1866 Prussia and Austria, two signatory powers of the Treaty of Paris of 1856, which for a time settled the Eastern question, were the chief belligerents in a conflict which arose out of German affairs and had no connection with the Turkish Empire or its dependencies. The Treaty of Paris was entirely untouched by that war, and the rights and obligations of Austria and Prussia under it remained as before.[3]

Treaties containing provisions which require a passive acquiescence, if not an active support, may continue to bind a state, although unable to carry out the provisions as in the Final Act of the Brussels Conference, 1890, for

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1. Quoted by Jacomet, p. 123.
2. Hall, International Law, p. 381.
3. Lawrence, International Law, p. 360.

the suppression of the slave-trade. Then, too, war may hinder the complete performance of the stipulations for a time; but when that weakened power is again able to carry into force all its obligations, the full treaty stipulations are binding upon it. France, for instance, when at the mercy of Germany in 1870, could not have made good her guarantee of the independence and integrity of Belgium made with England, Germany, Austria, and Russia in 1839. The treaty, however, was considered as remaining in force throughout. In like manner, France would not have been able to make good her guarantee of the independence and integrity of the Ottoman Empire which she had made with England and Austria in 1856.

When the war arises out of the treaty itself, as in 1877, when Russia and Turkey- two of the parties to the Treaty of Paris of 1856- went to war over questions growing out of the treaty, we have another situation. Under such conditions, no doubt, the legal effect upon the treaty will be determined by the will of the other signatory powers or of the victorious belligerent.[1]

Treaties of Transfer

Likewise, treaties concluded between the belligerent parties alone, such as treaties of cession or of confederation, are regarded as continuing to impose obligations until agreement, or until they are invalidated by a sufficiently long adverse prescription. For example: Alsace Lorraine was held by Germany under the treaty of cession of 1871 from France. Upon the outbreak of war between the two countries in August, 1914, the treaty of cession was not annulled, nor was it affected in any manner. The re-entrance of France

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[1] Lawrence, International Law, p. 361.

into the territory of Alsace Lorraine following the Armistice of November 11, 1918, was not as owner, but merely with the rights of a military occupant. The rights of France in Alsace Lorraine following the Armistice are identical with those which she had in territory which has never belonged to her. Her rights are those of a military occupant. Reacquisition of ownership can come only through the conclusion of peace and the assigning of the invaded territory by Germany to France.

The German Supreme Court, in a case decided on March 22, 1917, maintains that the laws promulgated by the German Command in Warsaw and Poland did not affect the legal status. The Court says: "The territory does not become a part of the territory of the occupying state; it remains a foreign country. .... The subjects of Poland during the period of transition are not without nationality, consequently an action for divorce instituted by a person of Polish nationality in a German court must be dismissed, because, according to Russian law, Russian subjects of the Hebrew faith married according to the rites of the Hebrew law cannot be divorced."[1] The German courts, it was held, had no jurisdiction over cases arising under the civil laws.

Vattel speaks of compacts which have no relation to the performance of reiterated acts, but merely relate to transient and single acts which are concluded at once, and suggests that they may be more properly called by another name than that of treaties. "Treaties of cession", says Martens, "of limits, of exchange, and those even which constitute a servitude of public law, have the nature of transitory conventions. Transitory conventions are perpetual from their very nature."[2] Such treaties are considered as remaining in force and subsist independently of any change in the sovereignty and form of

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1. Imperial Supreme Court, Civil Cases, March 22, 1917. 22 D.J.Z. 829. International Law Notes, March, 1918.
2. Twiss, The Law of Nations, pp. 417-418.

government of the contracting parties.

Most authors, however, consider that such treaties as define or transfer rights in rem are permanent and continue throughout hostilities. For in all these matters treaties supply, as between states, the place of conveyance between individuals; and once the rights conferred have duly passed they no longer depend upon the treaty, but on the general law. New dispositions may be made by the treaty of peace; but until then anterior stipulations remain in force.[1]

Judicial Decisions and Views of Publicists

Wheaton considers that transitory conventions, such as treaties of cession or boundary, generally subsist, notwithstanding the existence of war.[2] Many other writers and the English and American courts hold that "transitory conventions" are in no case destroyed or suspended by war; such conventions are less of the nature of an agreement than of a recognition of a right already existing. An American judge has held that if treaties which contemplate a permanent arrangement of territorial or other national rights were extinguished by the event of war, even the treaty of 1783, so far as it established our limits and acknowledged our independence, would be gone; and on the occurrence of war between England and the United States "we should have had again to struggle for both upon original revolutionary principles."

In the English case of Sutton v. Sutton the question whether American subjects who hold land in England were to be considered in respect to such

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[1] Cobbett, Leading Cases on International Law, Vol. I., p. 326.
[2] Elements of International Law, Part III., Ch. 2.

lands as aliens or subjects of Great Britain or whether the War of 1812 had terminated all the articles of the Treaty of 1794, the Court said: "The privileges of natives being reciprocally given, not only to actual possessors of land but to their assigns and heirs, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of the state of peace."[1]

Thus the treaties of 1783 and 1794 between the United States and Great Britain respecting alienage and confiscation were of a permanent character, and the Supreme Court held that they were not abrogated by the War of 1812.[2]

Phillimore ascribes the errors of writers in discussing the effect of war upon treaties to their failure to distinguish between treaties temporary in their nature and treaties which contain a final adjustment of a particular question, such as the fixing of a disputed boundary or ascertaining any contested right or property.[3] Kent considers it against all principles of just interpretation to hold treaties dealing with permanent arrangements of national rights to be annulled by the event of war.[4] Calvo holds the same view, and states that, "By necessary consequence, it is a principle that every stipulation written with reference to war, as well as clauses described as perpetual, preserve, in spite of the outbreak of hostilities, their obligatory force so long as the belligerents have not, by common accord, annulled them or replaced them with others."[5]

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[1] Wharton, International Law Digest, Vol. II., p. 45.

[2] The Society for the Propagation of the Gospel in Foreign Parts v. the Town of New Haven, 8 Wheaton, 494 (Cited in Scott's cases, p. 428.).

[3] International Law, Vol. III., p. 796.

[4] Commentaries, Vol. I., p. 177.

[5] Droit International, Vol. IV., p. 65.

PRIVATE PROPERTY

Treaties Relative to the Rights of Individuals

One of the most difficult problems in all international relations is the determination of the status of private property at the outbreak of war- especially when treaties of different character are involved. Phillimore declares that, as to questions of private property, the doctrine of the abrogation of treaties by war is "certainly not applicable".[1]

To-day the opinion prevails that war is a relation between states, and not individuals. This being true, individuals must be considered as maintaining rights which are permanent even against the necessities of war. Domin Petrushevecz affirms that war neither annuls nor suspends treaties which relate to individuals and their respective interests.[2] Bluntschli,[3] Martens,[4] and Neuman[5] are of the same opinion, and would secure all private property as far as possible against the inroads of warfare, whether recognized by special treaty or not. Bonfils affirms that "War neither annuls nor suspends treaties which touch and refer to private rights when the citizens do not bear the quality of enemies." Continuing, he says, "The same rule should apply to public law in relation to private interests, as succession, guardianship, bankruptcy, coin, proprietorship, literature, art, or industry."[6]

Thus treaties of establishment have been generally respected by war. American and foreign jurisprudence have respected and affirmed the permanency

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1. International Law, Vol. III., p. 796.
2. Projet de Code International, Article 108; Jacomet, p. 124.
3. Op. cit., p. 538.
4. Cited by Jacomet, p. 122.
5. Op. cit., p. 161.
6. Droit International Public, p. 395.

of treaties relative to individual rights to both citizens and aliens.

Under the treaty between the United States and Prussia of 1799, a German subject may sue in the American courts, if resident and entitled to the protection extended by the Proclamation, said the Court in Schultz Co., Inc. v. Raimes & Co., in 1917.[1] The Court said further: "This Court must take judicial notice of the public acts of the United States and its several departments, and therefore until this treaty is denounced as non-operative, it would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war, the right to collect their debts by whatever process or remedy the United States or its several states and territories afford. Although the treaty may become very oppressive to one of the contracting parties, it is not thereby revoked. Its revocation or denouncement requires a public act of which the judicial courts, executives, and legislative assemblies must take notice."

It no longer seems preposterous that subjects of different belligerent states may have peaceful economic relations with one another during warfare. The last Hague Conference went to the extent of adopting a rule that "It is especially forbidden to declare extinguished, suspended, or unenforceable in a court of law the rights and rights of action of nationals of the adverse party,"- an enormous advance in recognizing the exemption of private rights from impairment through war.

Some Other Judicial Views

It cannot be said, however, that such is the opinion of all writers, nor is it strictly observed in practice among the nations. In the case of

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[1] Schultz Jr. Co., Inc. v. Raimes & Co. (1917), 99 Misc. (N.Y.), 626; S.C., On appeal, 100 Misc. (N.Y.), 697.

the Rapid (1814), Justice Johnston says: "In the state of war, nations are known to nations only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist as to each other in a state of utter occlusion. If they meet it is only in combat. War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy- because the enemy of his country."[1]

In a more recent case of 1915 Justice Isaacs, of the Australian High Court, says: "We have to start with the fundamental truth that war means hostility between nations, and nations are to-day regarded from the standpoint of territorality with us, the sovereign has the prerogative of declaring war and making peace. When he declares war, the whole nation is at war, and in a state of hostility to the whole of the opposing nation considered territorily."[2]

Few writers take the opposite view. Bluntschli favors the view that commercial intercourse should remain uninterrupted, unless considerations of a military or political nature demand a different course.[3] The American and British writers, as a general rule, affirm that all such engagements are annulled.

International Unions

One of the important facts which the recent war has fastened upon the world conscience is that the unity of the world is not only real but necessary. No nation can live secluded and cut off from the remainder of the world.

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1. 8 Cranch, 155, 3 L ed., 520.
2. Moss and Phillips v. Donohoe, 20 Com. L. R., 580.
3. Moderne Völkerrecht, Article 674.

The destiny of nations is a common one: whatever may happen to the nations of Europe affects Asia and America. A great disaster, as war disrupting and disorganizing one nation, will be felt and borne by the others. Likewise, any development or advance in the arts of civilization by one nation must be shared by others. Science knows no national boundaries.

International coöperation and unity is the tendency of the age. A recognized authority[1] has described the situation as follows: "There are in existence over forty-five public international unions,[2] composed of states. Of these, thirty are provided with administrative bureaus or commissions. As the active cause for this development in modern civilization is rapidity and safety of communication and transport, it is natural that the interests of these activities should have received a world-wide organization in unions for postal, telegraphic, and railway communication and for the protection of the means and methods employed by them. No state can completely protect itself against the inroads of epidemic diseases or against the plotting of criminals without the coöperation of other governments. Unions have thus been established for mutual police assistance and for the development of international sanitation. In order that industrial competition may be raised to a plane where the individual laborer or manufacturer is sheltered against intolerable conditions, nations unite and follow a common plan of economic and labor legislation. For the ample development of such interests there have been founded the International Institute of Agriculture, the International Association for Labor Legislation, and many semi-public associations designed to realize the idea of a world unity in the great field of economic life."

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1. Reinsch, Public International Unions, p. 4.
2. These unions cover, in general, the fields of communication, economic interest, sanitation, prison reform, police powers, scientific purposes, special and local purposes, the International Union of Republics and States.

International unions constitute a series of treaties quite new among nations. They have their beginning in 1865, when the present telegraph and monetary unions were formed in Paris. Such organizations are the natural outgrowth of the rapid industrial development of the nations. The complex problems which are constantly arising may be facilitated and solved only through a mutual understanding and coöperation on the part of the nations.

What, then, is the effect of war upon such general engagements which are so vital to the life of nations? We must from the outset consider that they are not "arrangements between two powers, but acts carefully considered and adopted by a large number of nations which at times assume the character of laws decreed by the majority of the powers of the world." The outbreak of hostilities between two of the contracting powers may for a time prevent the mutual interchange of services under the treaty, but by this suspension of the treaty services they do not cease to be members of the international union, nor does their right to send representatives to the conference of the international unions of which they are members cease.[1]

This seems to be the general view of publicists. Thus M. Renault says: "When war comes about between two members of a union, it would seem that no one would think of contending that the treaty of union has, like some other conventions, been annulled or suppressed, and that it is not put in force again by the establishment of pacific relations."[2] Heffter-Geffcken says "that war should not be considered as annulling the obligatory force of such treaties."[3]

The needs of military efficiency do not require an absolute suspension of these vital relations. Then, too, as the principle that war is not a struggle

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[1] Russia and Japan each sent representatives to the International Scientific Congress at St.Louis, during the Russo-Japanese War, 1904.

[2] Revue Générale de Droit International Public, p. 19 (1896).

[3] Quoted by Jacomet, p. 123.

between individuals becomes more fully established, a common field within which the subjects of belligerents may meet in amity is created. "Thus", says Reinsch, "the work of the great international unions continues without interruption, even though war may exist between individual members. The hygienic bureau at Paris, the sanitary councils at Constantinople and Alexandra, the International Agricultural Institute, the Bureau of Patents and Copyrights, The Pan-American Union- these and others will continue their operations under the convention in times of war as well as in times of general peace."[1]

The Permanency of Unions

There exist to-day many international conventions which are intended to have general application and to establish uniformity of action among modern states in respect to their subject matter, and which are the result of the recognition by the parties of reciprocal and like duties of each toward all others. Such treaties, in the absence of any express provision for renewal, are considered as continuing in force. At the outbreak of the Spanish-American War, the Spanish Government asserted the general principle that the outbreak of war had annulled all treaties between the two powers. Spain later admitted "as settled international law" all the general international conventions between civilized nations which existed before the war to which Spain and the United States were parties. These include the International Postal Union, the Convention for Submarine Cables, the Conventions on the Subject of Industrial Property and Geneva Red Cross Conventions which were, at most, only temporarily suspended between the countries by war.[2] It is quite evident that as between third parties and the belligerents the conventions remained

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1. Public International Unions, p. 184.
2. Mr. Storer, American Minister at Madrid, to Mr. Hay, Secretary of State, August 21, 1900; Crandall, p. 450.

in full force.

Somewhat different in character from the other international unions are the Industrial Property Right Union, established in Paris, 1883, and the Copyright Convention of 1886. These have remained in force throughout the various wars that have occurred between the members of the union. The Conference of 1883 declared that war existing between the parties to the union would not annul the treaty.

Renault says: "The solidarity of international unions is verified in time of war. It is quite evident that the treaty of union continues to function during war between neutrals and each of the belligerents and one may demand that it function between belligerents themselves in a measure compatible with military operations."[1]

Cables

Difficult questions arise in connection with submarine cables in time of war. The belligerent who, for military purposes, cuts a cable or otherwise interrupts cable communication is thereby interfering with the general business of the world. Many efforts have been made to give cables international protection by declaring them inviolable. In 1864 France, Brazil, Portugal, Italy, and Hayti engaged among themselves "not to cut or destroy in times of war the French oceanic cable system and to recognize the neutrality of the telegraphic line." When the United States Government, in 1869, laid the great North American cables, she proposed similar disposition. In 1872 Austria-Hungary suggested that a commission representing the belligerent states or neutrals or both be instituted for the protection of cables.[2]

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1. Revue Générale de Droit International Public, p. 21.
2. Reinsch, International Unions, p. 179.

States have been reluctant to allow so important an instrument to remain in the hands of the enemy. Cables belonging to neutrals but landed upon hostile territory are, as a rule, cut. Thus, in the Spanish-American War the American army cut all European cables landed in Cuba, but controlled those connecting Cuba and the United States. This has been the general practice throughout the War of 1914-18. Although the Institute of International Law had, in 1902, adopted a general body of rules concerning cables in wartime, according to these rules cables connecting neutral countries are inviolable, and cables may not be cut in neutral territorial waters nor upon the high seas, except in areas where there is an effective blockade. Article LIV. of the

Convention of the Hague Conference (1907) states that submarine cables connecting a territory occupied with a neutral territory shall not be seized or destroyed, except in the case of absolute necessity. They also must be restored and indemnities for them regulated at the peace.

Attempts have been made to regulate communication by wireless telegraphy[1] and the general use of air craft[2] during war; but as yet no international engagement has been made to control their activities during hostilities. No treaties have been proclaimed, and each belligerent power will follow its own inclinations in the matter.

Conclusion

In keeping with the practice of nations and in harmony with the views of the majority of modern writers on the subject, and also in harmony with the opinions of the leading jurists in both Europe and America, we may safely affirm that there are treaties which are not affected by the hostile relations of the belligerent states.

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1. Annuaire de Droit International, 1906.
2. Journal Du Droit International Privé, Vol. XXVIII., p. 1036.

1. Such are boundary treaties, treaties of cession and the like, which represent completed acts, and are embodied in instruments which have some points in common with executed contracts.

2. The great international declarations, unions, conventions etc. which are acts carefully considered and adopted by the nations and assume the dignity of international legislation.

Part II.

THE EFFECT OF THE WAR OF I9I4-I9I8 UPON TREATIES ENTERED INTO BEFORE THE WAR.

Chapter VI.

THE HAGUE AND GENEVA CONVENTIONS

A. The Laws of War on Land.[I]

Introduction.

At the outbreak of the European War in I9I4 there was a large body of written law embodying the greater portion of the rules of conduct observed by states in their relations both in peace and war. These rules had been elaborated and embodied in the great international treaties and conventions, the chief of which were: the Declaration of Paris (I856), The Declaration of Saint Petersburg (I868), the Geneva Conventions of I864 and I906, the two Hague Conventions of I899 and I907, and the unratified Declaration of London of I909.

The most important of all these international acts were those framed by the second Hague Conference, in I907. The Hague Conventions were ratified by all the leading powers of the world, although some states withheld their acceptance of particular articles. In several conventions there may be found stipulations that their provisions should not apply in time of war, except between the contracting parties, and then only when all the belligerents are parties thereto.

[I] The Hague Conference (I907), Convention Concerning the Laws and Customs of War on Land, Higgins, p. 206 ff.

Among the belligerent powers Serbia, Italy, Montenegro, Bulgaria, and Turkey had not ratified any of the conventions, consequently they were not legally binding upon any of the powers engaged in hostilities. It seems, however, that none of the powers attempted to take advantage of the situation and avoid the obligations of the convention. Each state had in some manner, throughout the period of hostilities, acknowledged the rules of the Hague Conference and had set forth a desire to abide by these rules in its war activities. Thus the British prize court took the position that, although it was not legally bound by the terms of the Hague Conventions, yet it would nevertheless act as if they were binding, and it accorded German subjects the benefit of any convention which Germany had ratified.[1] France adopted a similar policy. Moreover, the prize courts of the various belligerent powers have generally treated the conventions as if they were legally binding in force, and in the determination of cases involving the claims of enemy subjects they have accorded them the benefits of any rights claimed under the convention, provided the state of which they were citizens was a party thereto. Indeed, in a number of instances belligerent states in their declaration of war announced their intention to conform to the conventions provided their adversaries would do likewise.[2] Other states appealed to the Hague Conventions, and publicly denounced the methods of their adversaries.[3]

As a major portion of both Hague Conferences consists of rules governing the actions of belligerents, these rules should have come into full force of operation on the outbreak of hostilities, August, 1914. These regulations

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1. Trehern, British and Colonial Prize Cases, Vol. I., p. 60.
2. See, for example, the Austria-Hungarian declaration of war against Servia, July 28, 1914, and the French declaration of war against Germany, August 4, 1914.
3. See the appeal of the German Emperor to the President of the United States against the use of soft nosed bullets by the French, and the official reports of the Belgian Government, the Bryce report, etc.

apply not only to the whole treaty but to the numerous separate stipulations dealing with varied subjects, where the parties have not witheld their consent to such articles. The chief purpose of the conventions, however, was to bring into existence a code of rules which would be universally recognized as binding on belligerents and neutrals- failing in peaceful settlement of their quarrels, as was the case in 1914.

The question has been repeatedly asked, will the conventions stand the test of war? In several of the conventions the rules laid down are to be observed, "so far as military necessity permit". The rules themselves represent the standard of conduct at which commanders are to aim; but under a life and death struggle may we not expect a practical commander to appeal to the rule of military necessity, following his own judgment in the matter?[1]

Military Necessity

The existence of treaty obligations was, indeed, readily admitted by the belligerent powers, but their binding effect was denied on grounds of military necessity, and the alleged right of retaliation etc. Still other belligerents refused to consider themselves bound by the rules of international law and treaty stipulations, on the ground that the obligation to conform to their prescription was reciprocal, so that the refusal of one belligerent to observe the laws released the enemy powers from their duty of observing them. "The war began by a denial on the part of a very great power that treaties are obligatory when it is no longer for the interest of either of the parties to observe them,"[2] says Ex-Senator Root. So numerous were the

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1. Higgins, The Hague Peace Conference, p. 16.
2. American Society of International Law Proceedings, 1915, p. 2.

instances of non-observance of the Hague Conventions that many publicly asserted that the whole fabric of international law had broken down.

The laws of war depend for their sanction primarily upon the honor of nations and conventional understandings. A nation struggling for self-preservation will be tempted to override these laws by the plea of military necessity, and any rules laid down which appear to conflict with military necessity will be judged by the pleader as imperative and burdensome. Such was the policy followed by Germany in August, 1914, when appeal was made to the rule of military necessity in violating her treaty obligations, upon her forceable entrance into Belgium territory. Germany was not only a party to the treaty of 1839 neutralizing Belgium, but was also a party to the Hague Conference, Article I. of which specifies expressly that "The territory of neutral powers is inviolable." Article II. follows with a definite prohibition: "Belligerents are forbidden to move across the territory of a neutral power troops or convoys, either of munitions of war or of supplies." This Convention was signed by over forty states, each of whom intended that it should have binding force, and not be repudiated upon grounds of self-interest.

A recognition of the deliberate violation of the neutrality of Belgium was announced formally by the German Chancellor in a speech delivered in the Reichstag on the eleventh day of August, 1914.[1] He said: "Our attitude is one of legitimate defense, and necessity knows no law. Our troops have occupied Luxemburg, and perhaps Belgium. This is in opposition to the prescriptions of the rights of nations. .... The injustices we thus commit we will repair, as soon as our military object has been achieved. A state which is

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[1] Official report on the violation of Belgium, p. 34, Note.

threatened to the extent which we are, and which is fighting for its existence, can only think of the means to make its position secure."

These actions were soon followed by various other acts which created the impression that Germany intended to disregard all rules of international law which stood between her and quick victory; consequently other belligerents refused to be bound by certain rules of international law, on the theory that they were reciprocal within their nature. Under the general clause of "military necessity", as provided for in the Hague Conventions and also in all military manuals, a doorway was opened through which Germany was the first to pass out from under the obligations of law, followed by the other belligerents under the guise of retaliation and reciprocation. Thus was contravened the well established rules of international law, and the most flagrant violations were committed under the plea of military necessity. The German doctrine of Kriegsraison, which is based on the view that a belligerent is bound by the laws of war only so long as they interpose no obstacles on the accomplishment of the objects of war, was freely invoked and rules of law laid down in the Hague Convention were disregarded.

This extreme theory, when carried to its logical conclusion, means the surrender of much which civilization has gained during the past centuries. It was the main excuse put forward by the German commanders for the destruction of art galleries, historic monuments, educational buildings etc. It served well as an excuse for the submarine atrocities, the burning and destruction of Belgian and French towns, for the deportation of Belgian and French laborers, for the bombardment of undefended towns, the shooting of hostages, the devastation of the region of the Somme, 1917, for the levying of excessive fines and requisitions, for the employment of asphyxiating gases,

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liquid flame, and other and varied forms of frightfulness.[1] In fact, the provisions of the Hague Convention which permitted a belligerent, under extreme circumstances, to disregard the rules of international law[2] were entirely set aside and the rules of military convenience, or Kriegsraison, were invoked and applied with "energy".

War Implements Forbidden by Treaty

The Hague Convention forbids the use of instruments of warfare which cause unnecessary destruction of property or which inflict unnecessary pain upon the adversary[3]. Among the instruments therein forbidden are asphyxiating and deleterious gases. Projectiles containing gas were used previously, but on April 22, 1915,[4] the world was shocked upon the announcement that the German Army had, by means of an ingenious contrivance, hurled quantities of deadly poisonous gases into the enemies' lines, carrying unheard of pain, death, and destruction into the adversaries' trenches.

Previous to this the German Army had poisoned many wells, etc. in South Africa;[5] it had bombarded undefended towns;[6] it had deported native Belgians;[7] had imposed unheard of fines, requisitions, penalties,[8] and had wantonly destroyed enemy private property and persons;[9] it had compelled Belgian civilians, as well as French civilians, to take part in military service against their nations;[10] had put hostages to death;[11] but the wholesale destruction of the enemy by poisonous gases seems to be the maximum of her atrocities.

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1. Phillipson, Ch. 4.
2. Preamble to the Convention Respecting the Laws and Customs of War on Land.
3. Article XXII.
4. Germany's Violation of the Laws of War, 1914-1915, p. 291.
5. Phillipson, p. 217. 6. Ibid., p. 162. 7. Ibid., p. 194.
8. Ibid., pp. 182, 222, 241. 9. Ibid., pp. 227 seq., 348 seq.
10. Ibid., pp. 237, 238 seq. 11. Ibid., 237 seq.

The allied powers hesitated, but eventually retaliated in kind, rendering the Hague proviso of no effect.

All this seems to have been in direct accord with the German philosophy of violence and frightfulness: "All measures may be employed to overcome the enemy which is necessary to attain the objects of the war;[1] "and again, "All means which modern inventions afford, including the most perfected, the most dangerous, and those which destroy most quickly the adversary en masse are permissible; and since these latter result most promptly in the attainment of the object of war they must be considered as indispensible, and, all things considered, they are the most humane."[2] That the German Government was quite responsible for the atrocities committed by the command in the field is entirely evident. The Imperial Chancellor, in an address to the Reichstag in March, 1916, declared that "every means that is calculated to shorten the war constitutes a most humane policy to follow; when the most ruthless methods are considered best calculated to lead us to victory, and a swift victory, then they must be employed." Again, in 1917, the German Ambassador at Washington, in an address to the Secretary of State, in defending Germany's resumption of unrestricted submarine warfare, said that Germany was "now compelled to continue the fight for existence with the full employment of all the weapons which are at its disposal".[3]

Prisoners and Their Treatment

Article IV. of the fourth Convention of the Hague Conference (1907) declares that prisoners must be humanely treated. As with most other articles

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[1] The War Book of the German General Staff, Translated by J. H. Morgan, N.Y., 1915, p. 84.
[2] Ibid., p. 85.
[3] Quoted by Garner, The German War Code, pp. 14-15.

of the Convention, the <u>entente</u> Powers and the United States have incorporated it in their military manuals as part of their instructions to the armed forces; and they further declare that prisoners may not be put to death except when duly convicted by trial under the laws of the captor. The inhuman treatment of prisoners by the German Government is affirmed by Mr. Gerard, American Ambassador to Berlin;[1] and also by prisoners returning from Germany following the Armistice.

The Hague Convention contains no provisions in regard to hostages. The allied Powers had either repudiated the practice of taking hostages or had offered a substitute for it.[2] During the war the Germans resorted to the practice of hostage-taking on a very large scale. In almost every town in Belgium which the German Army entered many of the leading citizens were seized and the inhabitants were notified that in case acts of hostility were committed by the civilian population the hostages would be shot.

<u>Sieges and Bombardments</u>

Article XXV. of the fourth Convention of the Hague Conference (1907) forbids the bombardment by whatever means of villages, dwellings, or buildings which are undefended, and the commanding officer of an attacking force is required to do all in his power to warn the authorities before commencing a bombardment, except in case of an assault.[3] Belligerents are enjoined to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments and hospitals.[4]

The German theory and practice, however, as they so often do, repudiate both the Hague rule and the Geneva Convention. The rules have been systemat-

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[1] My Four Years in Germany, Ch. 10; Phillipson, pp. 252 ff.

[2] The French manual, Art.92; British manual, Art.461; United States manual, Art.387.

[3] Article 26.

[4] Article 27.

ically disregarded by the German military commander during the war. The destruction of the University of Louvain, with its priceless library, the cathedrals of Rheims, Malines, St.Quentin, Soissons, and Arras; the ancient cloth hall at Ypres, the Historic Chateau de Coucy built in the thirteenth century, and many other such buildings is sufficient evidence of the manner in which the injunction of the Hague Convention has been respected. In 1917 221 city halls, 379 school buildings, 331 churches, and 306 other public buildings had been damaged or destroyed by the German armies in France. Fifty-six of the buildings destroyed were classed as historical monuments.[1] Many of these buildings were no doubt destroyed under conditions allowable by the laws of nations, but most of them were destroyed or damaged not through bombardment from the outside but were burned or destroyed while the German armies were in full possession. An example is the Castle of Coucy, which was wantonly destroyed as a measure of devastation before the retreat of the German armies and when no military object was subserved thereby.[2]

The practice of the Germans throughout the war proceeded in accord with their philosophy of frightfulness. They bombarded many open and undefended towns in Belgium and France without warning. They bombarded the coast towns of Hartlepool, Whilby, Scarborough, and Yarmouth- towns with no defense- and the bombardment was carried out during the night. Scores of women and children were killed and many private houses were destroyed.[3]

The allied Powers and the United States include in their international law both the letter and the spirit of the Hague Convention. Their observations and practices were strictly in accord with the Hague stipulations until a policy of retaliation was adopted against the German practices of bombardment and air raids.

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1. Report of the French Minister of Interior, 1917.
2. Garner, *Op. Cit.*, p. 28. 3. *Ibid.*, p. 27.

Requisitions and Contributions

Since the armies of the allied Powers and that of the United States were confined in their operations largely to allied territory, the opportunity of applying the rules of requisition and contribution were not afforded on any large scale. However, we may assume they would have conformed to the Hague rules as embodied in their manuals, unless by means of retaliation they would have disregarded them, as was done in many other instances.

The laws of war allow an invader to take supplies from the country occupied by him, but Article LII. of the fourth Convention of the Hague Conference (1907) expressly declares that they may be taken only for the needs of the army of occupation, and that, as far as possible, they should be paid for in cash; and if this cannot be done, receipts should be given and payment made as soon as possible. The German Kriegsbrauch, however, does not accept the Hague rules. For, we are told, "in case of necessity the needs of the army will alone decide as to the procedure;"[1] and again, that "the right of requisitioning without payment exists as much as ever and will certainly be claimed by armies in the field." It admits, however, that it has become the custom to furnish receipts; but it adds that the question of payment "will then be determined on the conclusion of peace."[2]

The commander in occupied territory is likewise allowed to requisition the services of laborers as well as supplies; but Articles XXII. and XLIV. of the Hague Convention expressly forbid the forcing of the inhabitants to perform any work having any connection with military operations, or to furnish

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1. Morgan, p. 176.
2. Ibid., p. 175.

the enemy with information concerning their own army and means of defense. These rules, as interpreted by the most modern writers, forbid compulsory labor in munition plants, work on fortifications, the digging of trenches, and the use of forced guides.[1]

The German practice, however, was in keeping with their own doctrine of Kriegsraison, rather than with the Hague rules. In the occupied regions of Belgium and France supplies were requisitioned with regard to the resources of the country. Elaborate inventories were made, by means of compulsory declarations, of the available stocks of everything which could be of use to the Germans, to prohibit the exportation of the same, except to Germany. A wholesale system of requisition was inaugurated. Growing crops were requisitioned while standing in the fields, while implements, machinery, quantities of raw materials, millions of cattle and horses were transported to Germany and sold to German buyers. Belgian factories were dismantled and their machinery carried off. Railroad rails and ties were torn up and transferred. In fact, in many instances the system of requisition was one of spoilation.[2] The Hague rule, which states that requisitions can only be made for "the needs of the army of occupation", was flagrantly disregarded.

The services of many thousand Belgian laborers were requisitioned for work in munition plants, digging of trenches, operating military railway trains and guides; and where persons thus requisitioned refused to perform assigned tasks they were usually deported to Germany. It is estimated that over 300,000 Belgians were arrested and forceably carried to Germany and put to work in the mines, factories, on farms etc.[3]

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[1] Lawrence, p. 418; Westlake, Vol. II., pp. 101-102; Hershy, p. 141; Speight, War Rights on Land, p. 369.

[2] Official Report of the Violation of the Laws of Nations, pp. 1-112.

[3] Garner, American Journal of International Law, Vol. XI., pp. 104 ff.

The military occupant may collect all the ordinary taxes levied by the state in the territory occupied, and in addition he may raise "other money contributions", subject to the condition, however, that the latter shall be levied "only for the needs of the army or for the administration of the territory in question".[1] The chief purpose of allowing an occupant to levy such exactions on the inhabitants is to permit an equitable distribution of requisitions between towns and cities on the one hand, and the country districts on the other- money being contributed by the former to purchase supplies requisitioned from the latter.[2]

Collective Fines

Throughout the war the Germans in both Belgium and France subjected the cities and communes to collective fines on a scale unprecedented in history. They proceeded on the theory that fines are the most effective means of insuring the obedience of the inhabitants of occupied territory.[3] Many towns, cities, and communes were punished by huge fines for offenses committed by individuals which the civil authorities were powerless to prevent and in which the population could not be regarded as accomplices. In many instances the fines were out of all proportion to the gravity of the offenses committed. In some cases they were levied on the inhabitants not for acts of the civil population but for acts committed by the regular armed forces of the enemy, which may not be punished by community fines in any manner, as they are legitimate acts of war. All this was done in harmony with the theory of collective punishment set forth in the Kriegsbrauch im Landkriege and defended on the ground that it was effective in preventing a repetition of the acts

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1. Article XLIX., Convention Respecting the Laws and Customs of War on Land.
2. Articles 423 and 424, British Manual.
3. Morgan, p. 178.

complained of.[1]

As in many other instances, the German theory is in direct opposition to the Hague Convention which forbids the imposition of collective punishments, pecuniary or otherwise, upon the inhabitants of occupied territory on account of misdemeanors of its individuals, for which they cannot be considered jointly and severally responsible.[2] The intent of the convention seems to be to confine the collective punishment to such offenses as have actually been committed and to the particular community that allowed the offense to be committed, so that each community becomes a surety for the behavior of the inhabitants.

A few examples from the many will suffice to show the policy followed by the German commanders. The City of Brussels was fined five times for alleged infractions of military rules. Neither of the offenses can be said to be an infraction of the stipulations of the Hague Convention. It was fined 5,000,000 francs in November, 1914, for the act of a policeman in attacking a German officer during the course of a dispute between them, and for facilitating the escape of a prisoner.[3] It was fined 5,000,000 francs July, 1915, for the alleged destruction of a German zeppelin by an aviator near Brussels; and in the same month it was fined 5,000,000 marks in consequence of a patriotic demonstration by the inhabitants on the occasion of the celebration of the national holiday. Early in 1916 it was fined 500,000 marks on the charge that a crime had been committed in the suburb of Shaerbeek with a revolver obtained in Brussels, where the possession of firearms by the citizens had been forbidden by the military authorities. The City was fined again in March,

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1. Morgan, pp. 177 ff.
2. Article L.
3. Garner, American Journal of International Law, Vol. XI., p. 515.

1918, amounting to 2,000,000 marks, on account of a demonstration by anti-Flemish agitators.[1]

Practically every stipulation of the Convention which should have been brought into full effect for the guidance of the belligerents in their war policies was set aside and ignored at some time during the period of hostilities. The direct effect of the war upon the Convention was to render it inoperative.

The Geneva Convention

The purpose of the Geneva Convention, as is well known, was to confer an immunity, as far as possible, upon all persons engaged in the humanitarian work of caring for sick and wounded soldiers, upon the places where they are collected and upon the ambulances and all other instruments employed in ministering to their needs.[2] Of the nature and extent of the immunity to be accorded, each belligerent is to be the judge, in so far as his operations are concerned. This is not always an easy task, as the commander must consider on the one hand the necessities of the military situation, and on the other the imperative obligations entered into for the purpose of ameliorating the suffering of the wounded etc.[3]

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[1] Reports on Violation of the Laws of Nations in Belgium, Massart (Belgians Under the German Eagle, p. 273); Garner, American Journal of International Law, pp. 515 ff.

[2] See Higgins, The Hague Peace Conference, pp. 35 ff. The Geneva Convention of 1864 was ratified by all the belligerents in the recent war. All of them except Bulgaria, Greece, Montenegro, and Servia had ratified the Convention of 1906. There being no "general participation" clause in the Convention, it was therefore binding on all the belligerents whose governments had ratified it.

[3] Davis, Elements of International Law, p. 527.

In December, 1914, the French Government issued a protest through the Spanish embassy at Berlin against the German violation of the Convention.[1] Serious charges were made against the Germans for deliberately bombarding hospitals on all its battle fronts.

One of the most glaring instances of the kind occurred on the night of August 19, 1917, when an attack was made by a German aviator on a hospital at Valdelain Court near Verdun. Twenty nurses and ten wounded soldiers were killed and forty-nine wounded.[2] At another time the same hospital was bombarded for six and one half hours, during the course of which nineteen persons were killed and twenty-six wounded.[3]

On many occasions the Germans conducted their aerial raids at night, when it was difficult to see the Red Cross markings. They were accused of deliberately adopting this policy in order to allege mistake whenever hospitals were victims of their attack.

This policy was maintained throughout the year 1918. In May a large group of British hospitals and buildings of well known character were raided during the night by German aviators and several hundred patients, physicians, and nurses were killed.[4] On June 10 Mr. Macpherson, under Secretary of State for War, stated in the House of Commons that during the preceding two weeks the Germans had bombed British hospitals in France seven times and that these attacks had resulted in 991 casualties, of which 338 were killed.[5]

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1. On April 10, 1915, the French Minister of War, in response to a question addressed to a deputy, stated that at the beginning of the war the French Government had scrupulously observed the terms of the Geneva Convention, notwithstanding Germany's disregard for its provisions. In consequence of Germany's conduct, the French Government, on November 1, 1914, suspended certain provisions of the Convention until assurance should be received from Germany of reciprocity of treatment.
2. New York Times, September 8; also, August 24, 1917.
3. Ibid., September 7, 1917.
4. Ibid., May 24, 1918.
5. Ibid., June 11, 1918.

Austrian aviators were also charged with having bombed hospitals in Italy, and Turkish troops were charged with having sacked an American hospital at Tabriz, although Turkey was not at war with the United States.[1] The Italians were accused of having shelled a Red Cross hospital at Garizia on September 26, 1915, which at the time was flying a Red Cross flag which was plainly visible.[2] Other charges were made against each of the *entente* Allies and the United States.

During the early operations in Flanders, it is alleged that it was practically impossible to remove the wounded from the battlefield, except under cover of night, owing to the persistent firing of the Germans on the ambulances and stretcher bearers while crossing the field.[3]

The Belgian Official Commission of Inquiry charge the Germans with frequently using the Red Cross or white flags for approaching the enemy with a view to attack, with firing upon ambulances, with maltreating ambulance drivers, and with killing the wounded.[4]

The Bryce Commission, in its report, confirms the charges of the Belgian Commission. It contains a large number of depositions of soldiers and Red Cross workers charging the Germans with firing upon hospitals, stretcher bearers, and ambulances; with using the Red Cross flag for purposes of approach; with hoisting it over motor cars armed with machine guns; with transporting munitions in ambulances; with torturing the wounded, and the like.[5]

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[1] New York *Times*, June 3, 1918.

[2] The President of the Red Cross Society at Trieste addressed a protest to the International Committee of the Red Cross Society at Geneva.

[3] Article by Mr. Powell, entitled "On the Firing Line", in Scribner's Magazine, October, 1915, pp. 464-5.

[4] See Reports on Violations of the Rights of Nations, etc., pp.10, 49 ff.

[5] See pp. 56 ff; 187 ff; and 202 ff.

The Russian Commission of Inquiry charged the Germans with torturing and even burning Russian prisoners and wounded.[1] The Serbian Government charged the soldiers of Austria-Hungary with committing numerous atrocities upon its prisoners and wounded.[2] The French accused the Germans of refusing to return Red Cross physicians, sanitary officers, and members of hospital staffs in accordance with the rules of the Convention. They were likewise accused of maltreating hospital officers and attendants and of robbing the Red Cross personnel of their equipment. Germany was notified by the French Government that, unless assurance were given that in the future the terms of the Convention would be observed by her forces, France would be driven to adopt retaliatory measures.[3]

Counter-charges were brought against the allied armies by the German and Austrian Governments. The Germans charged them with maltreating, robbing, mutilating, and even murdering German wounded; with attacking German motor cars while transporting the wounded under the Red Cross flag; with firing upon German hospitals and robbing them of their staffs and equipment; with arresting and detaining members of the ambulance corps; and with committing various atrocities as breaches of the Geneva Convention. Both the French and British Governments emphatically denied these charges.

The list of charges of violations of the Convention is too long to recount further; but, from established evidence, it may be affirmed that the stipulations of the Geneva Convention were not strictly observed by the bel-

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[1] An English Translation was circulated in America. See also Morgan's German Atrocities, pp. 151 ff.

[2] Reiss, Professor, How Austria-Hungary Waged War in Servia, pp. 13 ff.

[3] In consequence of the intervention of the International Red Cross Committee and satisfactory assurances from Germany, the threatened measures of retaliation appear not to have been applied at that time.

ligerents. Germany first transgressed the law, closely followed by her allies; whereupon her adversaries met her challenge either by public appeal or by retaliatory measures. Thus we see that the Convention cannot be said to have been brought into full effect by the war.

B. The Laws of Maritime Warfare

Detailed accounts of the activities of the navies of the belligerent states during the war need not be given here. It is sufficient to note that the introduction of new instruments of warfare so changed the conduct of the operations of the belligerent navies as to render treaty stipulations impossible of fulfillment. The use of the submarine, torpedo, air craft, and other modern instruments of war had not been provided for by law or treaty. The Central Powers, under the guise of military necessity, claimed the right to employ the use of such instruments, even though it were impossible to conform to the prescribed rules of law and treaty stipulations while using them.

The Entente Powers maintained that the use of such instruments of war as the submarine, by which treaty stipulations and well known rules of international law were disregarded, was nothing less than piracy, and severe retaliatory measures were adopted and carried into effect. The result was that the Hague and Geneva Conventions, which should have come into full effect, were set aside and rendered inoperative.

Chapter VII.

PATENT, COPYRIGHT AND TRADE-MARK ARRANGEMENTS

Introduction

As a rule, states have protected their citizens in their rights of discovery, invention and production through the grant of legal monopolies in the form of patents, copyrights, and trade-marks. Since science and learning know no national boundaries, states have been obliged to go further and make provision for the protection of their citizens in their rights beyond their national boundaries. This is accomplished through treaty arrangements. Such arrangements are ordinarily reciprocal in their nature and two or more states may be parties to the agreement.

The discoveries in science and their application by organization made a new industrial world during the nineteenth century. The far-reaching effects of these discoveries were early manifested in the rapid development of industrial institutions. The general need of international protection of citizens in their industrial property rights found expression in the International Industrial Convention held at Paris in 1883, at which time an international union was founded.[1] The purpose of this union was the creation of administrative rules by which the citizens of one state would be permitted, without expensive procedure, to come under the protection of the patent and trade-mark laws of the other contracting parties. The United States, Great Britain, Germany, France, Austria-Hungary, and almost all of the large pow-

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[1] Charles, Treaties etc., Vol. III., p. 367; Malloy, Vol. II., p. 1935.

ers are parties to the Convention.

The international protection of copyrights is provided for in the Berne International Copyright Union created by the Berne Convention of 1886, subsequently modified at the Paris and Berlin Conferences held May 4, 1896, and November 8, 1908, respectively. Under the terms of these Conventions, reciprocal rights of priority in regard to the filing of application for copyright grants may be made in favor of the citizens of the countries adhering to the Conventions.[1]

The question arises, then, whether conventions of this nature entered into between a number of states, some of which are at war with each other, are terminated or suspended by the war; also, are belligerent governments bound to protect the industrial property, literary works, musical compositions, etc. of enemy authors who hold patents and copyrights granted by such governments? The validity of the Paris Convention of 1883, relating to the international protection of industrial property, was generally recognized by the belligerents[2] throughout the war, and as far as international copyrights are concerned, the powers may be divided into two classes: First, those who were parties to the Berne International Copyright Convention of 1886; and second, those who were not. The majority of the European countries are members of the union and are subject to the stipulations thereof. But Russia, the Balkans, Austria-Hungary, and the United States are not members, and consequently the rights of their citizens or subjects were regulated by individual treaties.

The Berne Convention contains a stipulation to the effect that the Convention shall not be abrogated by the outbreak of war between the parties, but

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1. Clunet's Journal du Droit International, 1887, pp. 780 ff.; see also Ibid., 1911, pp. 685 ff.; also Ibid., 1917, p. 791.
2. Garner, American Journal of International Law, October, 1918, p. 777.

that the parties may annul or suspend it so far as they are concerned.[1] Although some of the belligerent governments treated the Convention as suspended, it does not appear that any of the belligerents considered it abrogated.

This general view seems to have been held by the courts of the different powers. The Japanese Imperial Supreme Court, in a decision of June 2, 1915, held that "the priorities accorded by the Conventions relating to industrial property are suspended during war, because these Conventions assume the existence of peaceable relations; and further that the Japanese Government, while giving to enemy subjects a protection and treatment in accordance with the dictates of justice and humanity, cannot go farther and accord them a friendly preference over the subjects of states not parties to the Convention.[2]"

The German Supreme Court took the same view in a case of July 14, 1917, in which the Court said: "The declaration of war terminated the Copyright Convention of June 20, 1884, existing between the German Empire and Italy, but did not terminate the Berne Conventions to which neutral states are also signatories, more especially, the war did not operate to divest a person of rights validly acquired before the war under such treaty."[3] The same Court had held in the previous year that vested rights remain unaffected by the declaration of war between two powers.[4] The United States Government took the same view which is set forth in the Trading With the Enemy Act approved October 6, 1917;[5] but, due to conditions arising out of the war, the whole situation was altered by the President's Proclamation of April 16, 1918, which prohibited the granting of patents or copyrights to enemy subjects in the future

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[1] Clunet, 1887, p. 780.

[2] *Ibid.*, 1916, p. 653.

[3] *Oberlander gericht*, Hamburg, July 14, 1917, 22 D.J.Z., 907. International Law Notes, March, 1918, p. 48.

[4] Ricordi & Co. v. Benjamin, December 16, 1916, 38 H.G.Z. 73.

[5] Public No. 91, 65 Congress, 1st Session. Text in Huberich, On Trading With the Enemy, p. 33.

and witheld the permission given to American citizens to apply for patents and copyrights in enemy countries.

The German Imperial Supreme Court, in a decision of October 26, 1914, distinguishes between the continued force of the conventions from the standpoint of international law, and their continued operation as a part of the municipal law, and concludes that, while possibly the conventions are not in force from an international point of view, they continue to be in force as a part of municipal law until suspended by legislation.[1] The better view, however, is that war suspends these conventions.

The Policy of The Individual Powers

The policy of the belligerents in respect to the Industrial Property and Copyright Conventions and their stipulations has been liberal and, in the main, just. At the beginning of the war an effort was made to maintain reciprocal relations in accordance with the Convention stipulation; but as the war progressed conditions were developed making it impossible to maintain these arrangements in force, so that at the close of the war all such engagements were either suspended in their operation or annulled.

The Policy of the United States

The United States Government followed the general policy of considering its patent, copyright and trade-mark arrangements with other powers to be suspended in their operation upon the outbreak of hostilities between them.

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[1] 85 Supreme Court Decisions, 374, Huberich, p. 323.

During the Spanish-American War it was held that non-resident Spanish subjects might not acquire the privileges of copyright, and the existing treaties were suspended;[1] but upon the proclamation of the treaty of peace, April 11, 1899, the privileges were immediately accorded by the United States to subjects of Spain without any express renewal. No new proclamation was considered necessary. By exchange of notes, in November, 1902, the arrangement was expressly reëstablished as regards its operation in Spain.[2]

Upon her entrance into the war, in April, 1917, the United States acted upon the assumption that the existing patent, copyright and trade-mark agreements with the Central Powers were suspended. That a doorway might remain open for future activities, provision was made in the Trading With the Enemy Act for enemies to make application for letters patent, copyrights or trade-mark labels etc.

The status of patents, trade-marks and copyrights held in the United States by enemy subjects was clearly defined by the Trading With the Enemy Act of October 6, 1917. In Section 10 (a) we read: "An enemy or ally of enemy may file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label, or copyright, and may pay any fees, therefore, in accordance with and as required by the provisions of existing law and fees for attorneys or agents for filing and prosecuting such applications. Any such enemy or ally of enemy who is unable, during war or within six months thereafter, on the account of conditions arising out of war, to file any such application, or to pay any official fee, or to take any action required by law within the period prescribed by law, may

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1. 22 Opinions, Attorney General (1898), 268.
2. Crandall (1910 ed.), p. 1710.

be granted an extension of nine months beyond the expiration of said period, provided the nation of which the said applicant is a citizen, subject, or corporation shall extend substantially similar privileges to citizens and corporations of the United States."

United States citizens were likewise granted the privilege of filing and prosecuting applications for letters patent or for registering trade-mark, print label, or copyright in the country of the enemy or ally of the enemy upon application to the President and meeting the requirements of law.[1] They were also allowed to make payments in Germany for the renewal of copyrights.

As in other belligerent countries, provision was made for granting licenses to American citizens for manufacturing or producing throughout the duration of the war articles, patents for which were held by enemy subjects, and for using trade-marks, copyrights etc. The authority to grant licenses was delegated to the President to be exercised by him whenever, in his judgment, the public welfare required.[2]

On April 16, 1918, the President issued an order directing that no patents or copyrights should in the future be issued to enemy subjects, and the permission given to American citizens to apply for patents in enemy countries was revoked. In October, 1917, two hundred applications for patents from German subjects were on file in the patent office, but each was deferred until information was received as to what policy Germany was pursuing.

A Patent Convention had been entered into between the United States and the German Empire on February 23, 1909,[3] and a Trade-Mark Convention between the United States and Austria-Hungary, on November 25, 1871.[4] A treaty relat-

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[1] Sec. (b), Huberich, On Trading With the Enemy, pp. 33 ff.

[2] Trading With the Enemy Act, October 6, 1917, Sec. 10 (c). The President in turn delegated to the Federal Trade Board Commission the same power.

[3] Malloy, Treaties etc., Vol. I., p.578. [4] *Ibid.*, p. 47.

ing to copyright was entered into between the United States and Austria-Hungary on October 16, 1912.[1] Proclamations of the President extending certain privileges under the American copyright law were made on April 15, 1892 (German Empire); September 20, 1907 (Austria); April 9, 1910 (German Empire and Austria); and December 8, 1910 (German Empire).[2]

The situation in the United States would, therefore, appear to have been as follows: The Patent Convention of February 23, 1909, and the reciprocal arrangements as to copyright contained in the various proclamations of the President named above were suspended upon the declaration of a state of war with the German Empire. The International Conventions relating to industrial property etc. were as to German subjects, suspended during the war. By the declaration of a state of war between Austria-Hungary and the United States on December 7, 1917, the International Conventions were suspended and the Copyright Conventions, the Trade-Mark Convention, as well as any proclamation of the President, under the copyright law, were also suspended.

The rights of Bulgarian and Turkish subjects, in so far as they were "allies of enemies", were governed by the Trading With the Enemy Act.

On the whole, the policy of the United States was liberal. In view of the large number of valuable patents and copyrights held in Germany by citizens of the United States, it was to the interest of the United States to deal liberally with the holders of German patents here, in order to receive reciprocal treatment by Germany. A very liberal provision was that which authorized enemy owners at the close of the war to institute proceedings in equity against licensees for the recovery of compensation for the use and en-

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[1] Charles, Treaties etc., Vol. III., p. 17.

[2] Malloy, Treaties etc., Vol. I. See Copyright Office Bulletin No. 14, 1918, pp. 39-40.

joyment of their patents, trade-marks, and copyrights, and which authorized the courts to adjudge a reasonable royalty, the amount to be paid out of the fund deposited by the licensee. Owners were likewise empowered to prosecute suits against other persons than licensees to enjoin infringements of their rights. The law and orders of the President, by their provisions, seems to be clearly based upon the assumption that the rights of enemy subjects in respect to their patents, trade-mark and copyrights were suspended, and that there was no thought of annulling or impairing their validity.

British Policy

The British Parliament, very early in the war, formulated a policy for dealing with enemy subjects in their copyright, trade-mark and property right grants made by the British Government.

The number of patents and inventions held by enemy subjects in England and her dependencies was very large. Under the English common law it is unlawful for a patentee, licensee or the proprietor of a registered trade-mark or design, who is a person of enemy nationality or domicile, to carry on any trade or business in British territory in respect to such property during the continuance of the war.

A manufacturer who was an enemy subject could not sell, in British territory, any articles for which he held a patent or design, nor could he apply any of the processes in respect to which he held a monopoly. Such a wholesale exclusion of enemy patents, especially when many of the most important articles were contracted by enemy patents, would deprive the nation of the use of many articles which were required for the national defense and economic life. Consequently, shortly after the outbreak of war Parliament enacted a

law empowering the Board of Trade, in its discretion and on the application of any person, to avoid or suspend wholly or in part any license granted to a subject of an enemy state. This action, however, was to be taken only after the Board of Trade had satisfied itself that the general interest of the Empire or community demanded such action.

The first act for the control of the patents, designs etc. under the emergency legislation was passed August 7, 1914, and is known as the Patents, Designs, and Trade-Mark (Temporary Rules) Act of 1914.[1] This act contained no reference to designs or licenses, consequently it was amended on August 28.[2] The act presumed that the license was to be exclusive and the monopoly continued. The power of the Board of Trade was so extended as to include the power to make all rules which it might think necessary or expedient for avoiding or suspending in whole or in part any patent or license, the benefit of which was enjoyed by a subject of an enemy state.[3]

By the same act the Board of Trade was authorized to grant licenses to any British subject for the exploitation of patents held by enemy persons, subject to such conditions as it might see fit. As to trade-marks, however, it could only avoid or suspend registration, but not grant licenses.

The Board of Trade issued its first body of rules on the 21st of August, 1914,[4] in which it set forth its powers over patents and licenses granted enemy subjects. Similar provisions were made on September 3 in respect to designs and trade-marks.[5] In the case of patents and designs, further provision

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1. Pulling, Manual of Emergency Legislation, 1914, p. 12.
2. Ibid., p. 439.
3. Ibid., p. 439.
4. Baty and Morgan, War, Its Conduct and Legal Results, p. 547.
5. Manual of Emergency Legislation, p. 233.

was made on September 7 for the granting of temporary or permanent licenses to use such patents and designs, but not trade-marks.[1] A large number of applications for orders avoiding or suspending enemy patents were granted by the Board of Trade,[2] and licenses were issued to British subjects to manufacture articles, the patents for which were suspended, whenever, in the opinion of the Board, the general interests demanded it.

On August 10, 1916, Parliament passed the Trading With the Enemy (Copyright) Act,[3] placing all copyrights, whether first published or made after or before the passing of the act, under control of a public trustee, in his capacity as custodian under the Trading With the Enemy Amendment Act of 1914. Subject to the regulations of the Board of Trade, the custodian administered all property or money arising from his rights as owner of such copyrights in like manner as property vested in him by the Trading With the Enemy Act of 1914.

British licensees, under these conditions, were required to pay royalties due the enemy patentee to the public trustee, and the same were held by him till the end of the war, when the Government disposed of them. Licensees were required to keep proper accounts and allow governmental inspection of the various properties held by them.

That the industrial rights of British subjects in patents issued by the enemy governments might be preserved, the Board of Trade, on September 23, 1914, granted a general license for the payment, in enemy countries, of fees necessary for obtaining the grant of patents, the registration of designs or trade-marks, or the renewal of the same, in such countries. In October of the same year the German Government issued a proclamation allowing payments

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[1] Manual of Emergency Legislation, p. 236.
[2] Solicitor's Journal and Weekly Reporter, Nov. 14, 1914, p. 54.
[3] Huberich, p. 383.

to be made in England for a similar purpose by persons domiciled in Germany. This provision, however, was so modified on December 23, 1918, as to apply only to the subjects of Germany and her allies and neutral persons.[1]

The policy of the British Government seems to have been in accord with the principles of justice. It was not the purpose of the Government to confiscate the rights of enemy subjects in patents, trade-marks, and copyrights granted under its authority, but rather to suspend them and to confer upon British subjects temporarily the right to exploit them whenever the interests of the nation in any way demanded. The ultimate rights of the owners were preserved and final adjustment was made at the peace treaty

German Policy

Germany's policy with respect to the treatment of industrial property belonging to enemy subjects was, at least at the beginning of the war, very liberal and more in accord with Rousseau's theory that war is a contest between armies and not peoples. In a decision rendered by the Reichsgericht on October 26, 1914, the Court said: "The German law of nations does not adopt the views of certain foreign systems of law that war is to be conducted so as to produce the greatest possible economic loss to the subjects of the enemy states, and that these subjects, therefore, are in a large measure to be deprived of the benefits of the general law governing civil rights. On the contrary, it adopts the principle that war is waged only against the enemy state as such, and against its armed forces, and that the subjects of the enemy state as regards civil rights are in the same legal position as before the war, except in so far as the legislature may create exceptions."[2]

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1. Garner, American Journal of International Law, Oct., 1918, p. 772.
2. 85 Decisions of Supreme Court in Civil Cases; Clunet, 1915, p. 785.

By an ordinance of September 10, 1914, the Patent Office was empowered to grant to the owner of a patent who, by reason of the war, had not been able to pay his annual fees, an extension not exceeding nine months from the date payable and without penalty; and in similar manner, when one had been prevented from complying, in due time, with the regulations of the Patent Office, he might make restitution, provided application were made within two months from the date when the act should have been done. These provisions would operate in favor of the subjects of enemy states only if similar concessions were granted to subjects of Germany by enemy states, and when such reciprocity had been recognized by notification in the official organ.[1] Other reciprocal arrangements were made which allowed Germans holding patents in England to make the necessary payments there for the purpose of preserving or renewing their patents.

In October, 1914, the Reichsgericht rendered a decision setting forth the legal policy regarding the question as to the rights of French citizens who had applied for patents in Germany under the Convention of 1883 for the international protection of industrial property. The Court rules that "enemy aliens, under the Convention, must be regarded as entitled to the same protection as those of German subjects until a law had been passed limiting the rights of enemy aliens. The Convention was a part of the law of the German Empire and under it enemy aliens were entitled to the same protection as they enjoyed before the outbreak of the war. The provisions of the Convention were not regarded as having been terminated or suspended by the outbreak of the war between the two powers." Speaking further, the Court said that "if the Convention had been terminated, it would have had no effect upon vest-

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[1] Solicitor's Journal and Weekly Reporter, Vol. LXI., p. 180.

ed rights of enemy aliens and applicants who had filed their applications before the war and had thereby acquired a vested right under article four of the Convention." Concluding, the Court declared that "international conventions dealing exclusively with civil matters are not affected by war."[1]

By an ordinance of July 1, 1915,[2] the Chancellor was empowered to limit or suppress, when the nation's interest demanded, the rights of enemy subjects in respect to patents and trade-marks. The exploitation of enemy patents, as in other countries, was later conferred upon German licensees who paid the royalties due to the owners into the Imperial Treasury.[3]

The general policy of the German Government toward its industrial property and copyright engagements with enemy states seems to have been liberal from the first. Vested rights were, during the first years of the war, considered as unaffected. The International Conventions, as a rule, were suspended;[4] while special treaties with the enemy states were terminated. In a decision of the Supreme Court rendered July 14, 1917, the Court said: "The declaration of war terminated the Copyright Convention of June 20, 1884, existing between the German Empire and Italy, but did not terminate the Berne Convention to which neutral states are also signatories."[5]

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1. Clunet, 1916, pp. 1314 ff.
2. Ibid., pp. 105-106.
3. Ibid.
4. Under the decision of the Imperial Court, referred to above, that the Paris Convention of 1883 was not affected by the outbreak of war, the Berne Convention, to which Germany was a party, was equally unaffected, and consewuently enemy copyright holders in Germany were fully protected during the first part of the war.
5. Above cited,p.109; International Law Notes, March, 1918, p. 48.

The French Policy

Almost a year had passed after the outbreak of hostilities before the French Government took action, through legislation, establishing rules controlling and exploiting the property of enemy subjects in respect to patents, copyrights, and trade-marks granted by the French Government. The policy followed was similar in principle to that of Great Britain and that adopted later by the United States.[1]

By an act of Parliament of May 27, 1915, the exploitation of patents and the use of trade-marks owned by German and Austria-Hungarian subjects was forbidden in the interest of the national defense. It would seem from the rules established, however, that it was not the intention to revoke or confiscate them. Wherever the public interest demanded or the national defense necessitated the manufacture and sale of patented articles, the Government might exploit directly the patent or grant the privilege of exploitation to French, neutral, or allied concessionaries.[2]

French owners were allowed to transmit to Germany the necessary sums for the payment of fees,and transfers of trade-marks made in due form before the war to enemy subjects were respected and given full effect; but payments from beneficiaries to enemy subjects were forbidden. Grants of patents to enemy subjects ceased upon the date of declaration of hostilities.[3]

The remaining belligerents followed a varied and individual course in their dealing with rights of enemy subjects previously granted. Russia is said to have appropriated all patents owned by Germans.relating to war inven-

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1. Garner, American Journal of International Law, October, 1918, p. 1 .
2. Text of the Law, Clunet's Journal, 1915, pp. 253 ff.
3. *Ibid*.

tions and declared all others to be "invalid".[1]

In August, 1915, the Austro-Hungarian Government, by way of retaliation against England and France, empowered the minister of public works, in the public interest, to abolish or restrict the trade-mark and patent concessions held by subjects of these countries in Austria-Hungary.[2]

The Supreme Court of Japan held that the outbreak of war had suspended the Paris Convention of 1883 as between Germany and Japan.[3] Italy followed a similar policy to that of the other powers, the Berne and Paris Conventions being considered suspended as between Italy and Germany and the treaty with Germany of June 20, 1884, terminated.[4]

Conclusion

On the whole, it seems that there was a general disposition on the part of the belligerent governments to respect the rights of enemy subjects in their patent and copyright grants. The decision of the Imperial German Court referred to above, in upholding the rights of a French citizen under the Paris Convention, and in vested property rights is most commendable. But toward the close of the war these conventions were considered as suspended. The British Comptroller-General of Patents ruled that all treaties such as the Berne Convention, between Great Britain and Germany, were suspended at the outbreak of war.[5] The French Government took the same position,[6] and before

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[1] American Journal of International Law, October, 1918, p. 775, Note.
[2] Clunet, 1915, p. 968.
[3] *Ibid.*, 1916, p. 653.
[4] *Op. Cit.*, International Law Notes, March, 1918, p. 48.
[5] Clunet, 1916, p. 550.
[6] *Ibid.*, 1915, p. 960.

the war came to a close in 1918 each belligerent party to the above named Conventions had considered them suspended in their operation.

On the other hand, there was not a uniform practice with regard to specific treaties between the belligerent powers. France early in the war declared all commercial treaties with Germany annulled; Germany declared the treaty of 1884 with Italy terminated, etc.; while some of the belligerents considered their special treaties with the enemy suspended by the outbreak of hostilities. Such, no doubt, was the policy of Great Britain and the United States.

Chapter VIII.

THE PEACE TREATY STIPULATIONS.[I]

Introduction

At the beginning of the war 1914, more than eight thousand treaties, besides numerous agreements of a minor character, were in force between the nations of the world. Before the close of the war a large number of these treaties had been affected either directly or indirectly in their operations.

Due to the nature of the war, the large number of States engaged, and the universal character which the war assumed the treaties controlling the commercial relations between neutrals, as well as between belligerents were, in many instances, rendered impossible of fulfillment.

Treaties of friendship and commerce between the belligerent powers were either expressly annulled or were recognized generally as having been abrogated upon the outbreak of hostilities. Among the extreme views , is that of the Chinese Delegation at the Peace Conference. They declared that China's declaration of war abrogated all treaties and agreements with Germany and that all German rights in China automatically reverted to China.[2] This statement was made, however, in a protest against the action of the Supreme Council in granting to Japan certain rights in Shantung and Kia-Chau which formerly belonged to Germany.

I. The New York *Times*, May 8, 1919. The text of the treaty stipulations between the allied and associated powers and Germany only is given in this reference.

2. The New York *Times*, May 4, 1919.

Treaties Renewed.

Each allied and associate state is given the right to renew any treaty with Germany in so far as consistant with the Peace Treaty by giving notice within six months.

Certain treaties are renewed by the Peace Treaty. "Rights as to industrial, literary, and artistic property are re-established. Except as between the United States and Germany, prewar licenses and rights to sue for infringements committed during the war are cancelled."

"Some forty multilateral conventions are renewed between Germany and the allied and associate powers, but special conditions are attached to Germany's readmission to several. As to postal and telegraph conventions Germany must not refuse to make reciprocal agreements with new states. She must agree as respects the radio-telegraphic convention to provisional rules to be communicated to her, and adhere to the new convention when formulated. In the North Sea fisheries and the North Sea liquor traffic Convention rights of inspection and police over associated fishing boats shall be exercised for at least five years only by vessels of these powers."

The status of the treaties entered into between the allied and associated powers and Germany before the war, as well as those entered into between Germany and neutral states during the war, is determined in the main by the conquerors. The Peace Treaty stipulations were drawn up by the allied and associated powers alone and handed to the German Delegates to sign.

Treaties Abrogated.

The Covenant of the League of Nations abrogates all treaties between

members inconsistent with its terms. This involves a large number of special treaties which were entered into before the war. The change of boundaries, the changed status of the German Empire, and the subjected condition to which it has been reduced necessarily renders a large number of these treaties incompatible with the stipulations of the League of Nations. The same situation prevails in Russia, Austria-Hungary, and Turkey. And, no doubt, the Peace Conference will meet this condition as it has done the German situation.

The effects of the war were so far reaching and universal in character that drastic and universal measures were expected to be applied in the Peace Conference. Germany is forced to consent to the abrogation of the treaties of I839, by which Belgium was established as a neutral state, and to agree in advance to any convention with which the allied and associated powers should determine to replace them. In like manner Germany is compelled to renounce her various treaties and conventions with Luxemburg, and recognize that it ceased to be a part of the German Zollverein from January I, I9I9, and, agree to any international agreement as to it, reached by the allied and associate powers.

Treaties entered into between Russia and Germany and Roumania and Germany since I9I4, are declared annulled and at an end. Reinsurance treaties are abrogated unless invasion had made it impossible for the reinsured to find another reinsurer. Any allied or associate power, however, may cancel all the contracts running between its nationals and a German life insurance company. The latter is obliged to hand over the proportion of its assets attributable to such policies.

China as to the Chinese customs tariff arrangement of I905 regarding

Whangpoo, and the Boxer indemnity of I90I: France, Portugal, and Roumania, as to the Hague Convention of I903, relating to civil procedure, and to Great Britain and the United States as to article III, of the Samoan treaty of I899, are relieved of all obligations toward Germany.

The Validity of Treaties.

One of the hopeful features of the League of Nations , drawn up at the Peace Conference, is the provision for the general recognition of the validity of treaties. All treaties entered into between members of the League "will be registered with the secretariat and published." Thus publicity is assured and troublesome secret treaties will be a thing of the past. Further provision is made for the renewal or reconsideration of treaties that have been in force for a time. The assembly will act as an advisory body. According to the wording of the Covenant" the assembly may from time to time advise members to reconsider treaties which have become inapplicable or involve danger of peace."

The validity of international engagements such as treaties of arbitration is established. Member states are pledged to submit matters of dispute to arbitration, and any members resorting to war in disregard of the Covenant may be debarred from all intercourse with other members, and further measures of coercion may be employed should the assembly deem it necessary.

A feature of the Covenant which is new in the annals of international affairs and most interesting as well, especially to the American people, is the recognition of the validity of "regional understandings like the Monroe Doctrine for securing the maintenance of peace." The formal recognition of the Monroe Doctrine by the members of the League of Nations, will, no doubt,

go far toward the assurance of future peace, and so maintain a better understanding between the two Continents.

The effect the war has had upon treaty stipulations has, to say the least, been a great disappointment. Treaties entered into for the purpose of controlling belligerent activities were ignored. By the drastic measures of the Peace Treaty, engagements , which ordinarily would have returned into force on the establishment of peace, are abrogated. But perhaps one of the most far reaching effects of the war upon treaties has been to point out the futility of such engagements without providing for their enforcement, and this the Covenant of Nations attempts to do.

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Vita

The author of this Thesis, Andrew Franklin Hunsaker, was born near Cobden, Union County, Illinois, August 1, 1880. He obtained his elementary education in the public schools of Illinois, graduating from the High School at Cobden in 1899. He was graduated from the Southern Illinois State Normal University, Carbondale, Illinois, in 1903. He attended the University of Illinois the summer sessions of 1906, 1907, and 1908, and the regular sessions of 1907-1909, when he was granted the degrees of A.B. and M.A. by the University. He was a graduate student in Political Science at the University of Wisconsin the summer session of 1909 and the school year of 1909-1910; at Columbia University one semester, 1914-1915; and at the University of Illinois 1917-1918 and 1918-1919.

He was employed as instructor in history in the Kinmundy, Illinois, High School, 1903-1904; Principal of the High School, Cobden, Illinois, 1904-1905; and Superintendent of the Public Schools of Cobden, Illinois, 1905-1907. He was Instructor in History in the University of North Dakota, 1910-1914; and Assistant in Economics in the University of Illinois, 1917-1918.

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